TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
APPELLANTS,

vs.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

FILED OCTOBER 31, 1950.

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 5, 1950.

—1545

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681-N

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

v.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

COMPLAINT—Filed May 3, 1950

The above named plaintiff, complaining of the above named defendants, alleges:

I

Plaintiff, Southern Railway Company, is and was at the times hereinafter stated, a corporation organized and existing under the laws of the State of Virginia, and as such is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points within the State of Alabama on the one hand and points in other states throughout the south on the other hand, and as such common carrier is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

II

The defendant, Alabama Public Service Commission, consisting of a President and two Associate Commissioners, is and was at the time hereinafter stated, an administrative body, created under the laws of the State of Alabama, (Title 48, Section 1, Code 1940) and authorized under the laws of the State of Alabama to exercise certain regulatory powers over plaintiff, and other common carriers by railroad, (Title 48, Section 106, Code 1940). The principal office and official

domicile of said Commission is located in the City of Montgomery, County of Montgomery, State of Alabama, being within the Middle Judicial District of the State of Alabama, and the Northern Division thereof. (Title 48, Section 11, Code 1940). Defendant Persons, is President, and defendants Hitchcock and Owen, are Associate Commissioners, of said Commission, and defendant Carmichael is Attorney General for the State of Alabama, and are citizens of the [fol. 3] State of Alabama and residents of Montgomery, Montgomery County, located in the Middle Judicial District of Alabama, and the Northern Division thereof. Defendant Carmichael, as Attorney General of the State of Alabama, is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama, and is Attorney for Defendant Alabama Public Service Commission.

III

This is a suit of a civil nature between citizens of different states, and arises under the Fourteenth Amendment to the Constitution of the United States, as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

IV

By Title 48, Section 35 and Section 106, of the Code of Alabama of 1940, plaintiff, and other common carriers by railroad, are required to file an application with defendant Commission for a permit to abandon passenger train service and obtain from the Commission a permit allowing such abandonment before it shall abandon operation of passenger service on its lines of railroad in Alabama. No standards for the guidance of the Commission are prescribed, and plaintiff is advised and believes, and therefore alleges, for the purpose and only for the purpose of avoiding an admission of record that the statutes are unconstitutional and void as an unlawful delegation of legislative power, but the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama. Nevertheless, in compliance with said statutes plaintiff, on, to-wit, the 13th day of September, 1948, filed with defendant Commission an application for authority to discontinue the operation of two certain local interstate passenger trains

being operated daily between Tuscumbia, Alabama and Chattanooga, Tennessee, viz:

Train No. 8, leaving Tuscumbia at 5:54 A. M., arriving Chattanooga at 11:50 A. M.

Train No. 7, leaving Chattanooga at 5:15 P. M., arriving Tuscumbia at 9:11 P. M.

Attached to said application and made a part thereof was "Exhibit A", which showed that plaintiff's operation of said two passenger trains for the twelve month period from March 1, 1947 to February 29, 1948, inclusive, showed that the wages for the train and engine crews and the pay roll taxes paid by plaintiff for the benefit of said crews, plus train fuel consumed in the operation of said trains was [fol. 4] only a few thousand dollars less than the amount of gross revenue earned by said trains from the handling of passengers, mail, and express, and further, that in the light of other direct expense of their operation the total cost of direct expense (not including the expense properly apportionable to these two trains to cover overhead, dispatching, supervision, maintenance of way and structures, depreciation, ticket agents, ticket office expense, and the like) exceeded the total gross revenues for said twelve month period by $78,710.74. Plaintiff attaches a copy of said application and "Exhibit A" thereto to this complaint marked Exhibit No. 1, to which reference is prayed for a more complete understanding of said application.

V

The defendant Commission set said application down for hearing at Huntsville, Alabama for June 2, 1949 but the date for the hearing was continued by the Commission until August 4, 1949 and again until October 6, 1949 when it was heard and taken under submission by three representatives of the Commission, none of the defendant commissioners being present for the hearing. After holding the case under submission for approximately six months the Commission entered its report and order in the case on April 3, 1950 denying the plaintiff's said application for authority to discontinue the operation of its said two local passenger trains. In addition to the statement of operating results of these two trains for the year March 1, 1947 to February 29, 1948, inclusive, attached as Exhibit A to said application to the

Commission the plaintiff offered in evidence on the hearing a statement of the operating results for the twelve month period March 1, 1948 to February 28, 1949, and for the five month period March 1, 1949 to July 31, 1949 attached as Exhibit No. 2 and Exhibit No. 3, respectively, and made a part of this complaint. As shown by these three exhibits covering these three separate periods the plaintiff's losses from the operation of these two trains from March 1, 1947 to July 31, 1949 became progressively more burdensome.

Because of the fact that the two trains were out of service under O.D.T. and I.C.C. orders for forty-three days in 1948, twenty-six days in 1949, and sixty-two days in 1950, in order to get a comparison of the progressive decline in passenger revenue during the three periods and the fourth period August 1, 1949 to March 31, 1950, it is necessary to break down each period into days and show the passenger revenue per day. This is done on attached Exhibit No. 4 made a part of this complaint. As appears from this exhibit the passenger revenue per day from these two trains de-[fol. 5] clined from $180.94 for the year ending February 29, 1948 to $124.74 for the year ending February 28, 1949, to $97.02 for the five month period March 1, 1949 through July 31, 1949, and to $83.11 for the eight month period August 1, 1949 through March 31, 1950, the latest period for which the figures are presently obtainable. Percentagewise this is a decline from the average daily revenue of these two passenger trains during the first period of approximately 30 percent during the second period, approximately 46 percent during the third period and approximately 54 per cent during the fourth period.

For further comparision, plaintiff attaches as Exhibit No. 5 made a part of this complaint a statement of the wages of the train and engine crews, payroll tax, railroad retirement and unemployment insurance thereon, and the cost of train fuel only, covering the four above periods broken down into days and showing the daily cost for each of said periods of these three expense items only. Comparing this Exhibit No. 5 with Exhibit No. 4 it appears that the passenger revenue falls short, by $57.10 per day during the first period, $151.45 per day during the second period, $168.24 per day during the third period, and $195.43 per day during the fourth period, of the amount necessary to pay only these three items of expense incurred in the operation of the two trains. And plaintiff alleges that it is under no duty to

operate these two trains for the transportation of United States mail as the defendant Commission and the Courts have often decided, the distribution of the United States mail being the responsibility of the federal government. Neither is the plaintiff under any duty to operate these two trains for the transportation of express as that is the responsibility of the Railway Express Agency. Besides, the four remaining passenger trains operating on this line of road afford ample facilities for the transportation of United States mail and express, if the federal government and the Railway Express Agency desire to contract with the plaintiff for such transportation.

VI

Plaintiff further avers that in addition to its local passenger trains Nos. 7 and 8 which it seeks to discontinue, it operates on its Memphis and Charleston Division between Memphis and Chattanooga, Tennessee, two other local passenger trains Nos. 35 and 36. No. 36 leaves Memphis at 8:00 A.M., leaves Tuscumbia at 12:40 P.M., arriving at Chattanooga at [fol. 6] 7:00 P,M. where it connects with the Birmingham Special for Washington, New York and intermediate points. No. 35 after connecting with the Birmingham Special from New York, Washington and intermediate points leaves Chattanooga at 8:00 A.M., leaves Tuscumbia at 12:30 P.M., arriving at Memphis at 4:50 P.M. These two trains also make connections at Chattanooga with through trains between Chattnooga, Cincinnati and intermediate points and between Chattanooga, Atlanta and Jacksonville, Florida, and intermediate points. Nos. 35 and 36 are diesel-powered, air-conditioned first class trains with standard day coaches for both white and colored passengers and each carries a through Pullman sleeper and club car which runs between Memphis and Washington. These two trains make all of the stops which trains Nos. 7 and 8 make between Tuscumbia and Stevenson (the most easterly point on plaintiff's line; all of plaintiff's trains east of Stevenson operate over the line of the N. C. & St. L. Railway to Chattanooga). In addition to its said local passenger trains Nos. 7 and 8 and Nos. 35 and 36, plaintiff also operates on the line between Tuscumbia and Chattanooga trains Nos. 45 and 46 "The Tennesseean". These are Streamlined Coach-Pullman air-conditioned diesel-powered trains operating between Memphis and Washington. No. 45 leaves Chattanooga at

12:50 A.M., leaves Tuscumbia at 4:20 A.M., arriving at Memphis at 7:45 A.M. No. 46 leaves Tuscumbia at 11:10 P.M., arriving at Chattanooga at 4:10 A.M. Although these are through Streamlined passenger trains with fast schedules between Washington and Memphis they make five stops in the short distance of 128 miles between Tuscumbia and Stevenson, viz. Tuscumbia-Sheffield, Decatur, Huntsville, Scottsboro and Stevenson.

VII

Plaintiff further avers that the area in the several counties of Alabama through which its line of railroad between Tuscumbia and Chattanooga extends and over which said local passenger trains Nos. 7 and 8 and Nos. 35 and 36 and said Streamlined trains Nos. 45 and 46 operate is traversed by improved and paved federal and state highways substantially paralleling plaintiffs line of railroad through said several counties, which said improved and paved highways are extensively used by common carrier bus lines, operating on frequent and convenient schedules, and by private automobiles.

[fol. 7]

VIII

Plaintiff therefore avers that, in view of the small amount of passenger revenue derived from the operation of said local passenger trains Nos. 7 and 8 and the little use thereof by the traveling public as shown by paragraph V of this complaint, and in view further of the ample service furnished by the other two local passenger trains and the five local stops of "The Tennessean", all operated by plaintiff over its said line of railroad in Alabama between Tuscumbia and Chattanooga as shown in paragraph VI of this complaint, and of the improved and paved federal and state highways substantially paralleling plaintiff's line of railroad in Alabama between Tuscumbia and Chattanooga on which common carrier buses are operated on frequent and convenient schedules and on which also private automobiles are extensively operated as shown by paragraph VII of this complaint, there is no public necessity for the continued operation of said local passenger trains Nos. 7 and 8. Such lack of public necessity is reinforced and emphasized by the heavy losses of upwards of $10,000.00 per month sustained by the plaintiff in their operation as shown by Exhibit No. 3

hereto. And plaintiff further avers that said order of the Commission of April 3, 1950 denying the plaintiff's said application for authority to discontinue the operation of said two trains is contrary to the evidence submitted on the hearing of said application, is unjust, unreasonable, unconscionable, arbitrary and confiscatory. Said order is directly in the teeth of the policy of the Congress of the United States and of the State of Alabama as expressed in the Interstate Commerce Act and Title 48 of the Alabama code requiring efficient and economical management by the plaintiff and other railroad companies of their respective common carrier properties. Said order deprives plaintiff of its property for public use without just compensation, denies to plaintiff due process of law, denies to plaintiff the equal protection of the law, and unduly burdens interstate commerce, all in violation of the Constitution of the State of Alabama and of the Fifth and Fourteenth Amendments to, and the Commerce Clause of, the Constitution of the United States, and should be held unlawful, null, void and of no effect.

IX

Plaintiff has exhausted all administrative remedies available to it and now seeks the protection of this Court against the further confiscation of its property by said order of the defendant Commission requiring the continued operation of [fol. 8] said two local passenger trains.

Wherefore, plaintiff prays:

1. That plaintiff's bill be received, filed and docketed in the records of this Court.

2. That process issue requiring defendants and each of them to appear and answer plaintiff's complaint.

3. That a special court of three judges be organized to hear and determine this cause as provided by New Title 28, U. S. Code, Section 2284.

4. That on a hearing, after at least five days notice of such hearing shall have been given to Hon. James E. Folsom, Governor, and to defendant, A. A. Carmichael, Attorney General of the State of Alabama, an interlocutory injunction pending the final disposition of the cause be issued enjoining defendants, separately and severally, from proceeding against the plaintiff, its officers, agents or employees to enforce any penalties or other remedies provided under the

laws of the State of Alabama on account of plaintiff's or their failure to continue th- operation of said two local passenger trains Nos. 7 and 8 between Tuscumbia and the Tennessee State Line as required by said order of defendant Alabama Public Service Commission of April 3, 1950; and that on the final hearing of this cause said order of the defendant Commission be held unlawful, null, void and of no effect and that such interlocutory injunction be made permanent.

5. That plaintiff have such other, further and different relief as may be just and equitable, and plaintiff prays for general relief.

Marion Rushton, 1203 Bell Building, Montgomery, Alabama; Charles Clark, Southern Railway Building, Washington, D. C.; J. T. Stokely, 1038 Brown-Marx Building, Birmingham, Alabama.

Rushton, Stakely & Johnston (Montgomery, Alabama), Of Counsel.

Benners, Burr, Stokeley & McKamy (Birmingham, Alabama), Of Counsel.

[File endorsement omitted.]

[fol. 9] EXHIBIT No. 1 TO COMPLAINT

Before The

Alabama Public Service Commission

Docket No. 11988

Petition of Southern Railway Company to Discontinue Passenger Trains Nos. 7 and 8 Operated Between Tuscumbia, Alabama, and Chattanooga, Tennessee

J. T. Stokely, Charles Clark, Attorneys for Petitioner.

Dated: September 13, 1948.

The petition of Southern Railway Company respectfully shows:

I

Petitioner is a corporation of the State of Virginia and as such is engaged as a common carrier by rail of persons

and property in intrastate commerce between points within the State of Alabama and in interstate commerce between points in the State of Alabama on the one hand and points in many other states on the other hand.

II

Petitioner as such common carrier operates two passenger trains daily between Tuscumbia, Ala., and Chat-
[fol. 10] tanooga, Tenn., a distance of 165 miles.

Schedule No. 8:	Leave	Tuscumbia	5.54 AM
	Arrive	Stevenson	9:30 AM
	Arrive	Chattanooga	10:50 AM
Schedule No. 7:	Leave	Chattanooga	4:15 PM
	Arrive	Stevenson	5:25 PM
	Arrive	Tuscumbia	9:11 PM

III

Petitioner seeks authority to permanently discontinue the operation of said passenger trains because they are little used by the public and because the cost of operating said trains greatly exceeds the total revenue earned by said trains. Petitioner attaches hereto, as Exhibit A, statement of two sheets showing the operating results of said trains for the twelve-month period March 1947 to February 1948, inclusive. Said exhibit shows total revenue amounted to $98,842.92 for hauling passengers, mail and express. The direct expenses incurred in the operation of said trains such as wages of the crew, train fuel, repairs to locomotives, cars, and the like, amounted to $177,553.66.

The total direct expense of operating these trains exceeded the total revenues, for the twelve-month period, by $78,710.74. The expenses of operation included in the foregoing items are only certain direct expenses and do not include anything for overhead, dispatching, supervision, maintenance of roadway and structures, depreciation, ticket agents, ticket office expense, and the like. Had those
[fol. 11] items been included, the loss would have been even greater.

IV

Should trains Nos. 7 and 8 be discontinued, there would remain in operation over petitioner's line between Tus-

cumbia and Chattanooga the following described daily passenger train service:

Schedule No. 35:	Lv.	Chattanooga	7:45 AM
	Ar.	Tuscumbia	12:52 PM
Schedule No. 36:	Lv.	Tuscumbia	12:32 PM
	Ar.	Chattanooga	6:25 PM

Nos. 35 and 36 make all the station stops between Tuscumbia and Chattanooga that are made by Schedule Nos. 7 and 8.

Schedule No. 45:	Lv.	Chattanooga	11:50 PM
	Ar.	Tuscumbia	4:23 AM
Schedule No. 46:	Lv.	Tuscumbia	10:57 PM
	Ar.	Chattanooga	2:00 AM

Nos. 45 and 46 make limited station stops at Stevenson, Scottsboro, Huntsville, Decatur and Sheffield, Ala.

V

The territory between Tuscumbia, Sheffield, Decatur, Huntsville, Scottsboro, Stevenson and Chattanooga, through which said trains operate, is served by improved highways available to the public use in driving private automobiles and trucks, and adequate bus service is maintained over said highways.

[fol. 12]

VI

Your petitioner is posting at each station served by said trains Nos. 7 and 8 a notice of the filing of this petition, in the form of Exhibit B hereto, and petitioner will upon the expiration of the required ten-day posting period file with this Commission proof of such posting.

VII

The continued operation by your petitioner of Trains Nos. 7 and 8 between Tuscumbia and Chattanooga will constitute an undue burden on interstate commerce and will involve the taking of petitioner's property without due process of law and be a denial to your petitioner of the equal protection of the law contrary to the provisions of

the Constitution of the State of Alabama and of the United States.

Wherefore, your petitioner prays for the reasons hereinabove stated, and others to be shown at the hearing, that it may be duly authorized and permitted in the manner prescribed by law to discontinue the operation of said [fol. 13] passenger trains Nos. 7 and 8 between Tuscumbia, Ala., and Chattanooga, Tenn., in so far as they are operated in Alabama, that is, between Tuscumbia and Stevenson, 121 miles.

Southern Railway Company, by W. F. Cooper, Its Superintendent.

J. T. Stokely, (1038 Brown-Marx Bldg., Birmingham, Ala.); Charles Clark, (Southern Railway Bldg., Washington, D. C.), Attorneys for Petitioner.

(Here follows 1 paster, side folio 14-15)

[fol. 14-15]

EXHIBIT "A" TO PETITION

Southern Railway Company

Operating Result of Passenger Trains Nos. 7 and 8—Chattanooga, Tenn. to Tuscumbia, Ala.

	March 1947	April 1947	May 1947	June 1947	July 1947	August 1947	September 1947	October 1947
Revenues:								
Passenger	$5,541.26	$5,195.99	$5,626.95	$5,653.25	$6,152.89	$7,146.59	$5,597.44	$5,579.20
Mail	1,990.66	1,953.04	2,048.20	1,976.29	1,988.70	2,002.02	1,885.51	1,984.16
Express	.....	.....	.....	.....	.....	.....	.....	.....
Miscellaneous	3.57	3.99	4.49	3.07	2.24	10.15	1.86	17.57
Total Revenues	$7,535.49	$7,153.02	$7,679.64	$7,632.61	$8,143.83	$9,158.76	$7,484.81	$7,580.93
Direct Expenses—"Actual"								
Wages, Train and Engine Crews	$4,024.34	$3,897.60	$4,024.34	$3,897.60	$4,024.34	$4,024.34	$3,897.60	$4,024.34
Payroll Taxes, R. R. Ret. & Unemp. Ins.	270.20	267.31	270.20	262.07	270.20	270.20	262.07	270.20
Train Fuel	2,830.80	2,827.68	2,541.84	2,454.30	2,643.06	2,604.70	2,584.23	2,769.14
Damage to Live Stock on R. of W.	.....	.....	.....	.....	.....	.....	.....	400.00
Total Direct Expenses—"Actual"	$7,125.34	$6,992.59	$6,836.38	$6,613.97	$6,937.60	$6,899.24	$6,743.90	$7,463.68
Direct Expenses—"Apportioned"								
Enginehouse Expenses	$704.63	$741.30	$875.13	$931.80	$924.11	$884.74	$933.60	$964.72
Passenger Locomotives—Water	147.90	140.40	147.90	143.14	147.90	147.90	143.14	147.90
" " —Lubricants	252.06	239.28	252.06	243.94	252.06	252.06	243.94	252.06
" " —Other Supplies	136.44	129.54	136.44	132.04	136.44	136.44	132.04	136.44
" " —Repairs	3,637.26	3,452.88	3,637.26	3,519.94	3,637.26	3,637.26	3,519.94	3,637.26
Passenger Train Cars —C. H. L. W. & Icing	457.20	440.30	469.32	459.64	474.16	466.87	459.61	449.98
" " " —Lubricants	31.75	30.58	32.60	31.92	32.93	32.42	31.92	31.24
" " " —Other Expenses	25.40	24.46	26.08	25.54	26.35	25.94	25.53	25.00
" " " —Repairs	942.97	908.10	967.98	948.02	977.96	962.93	947.96	928.06
Chattanooga Station Company	486.36	573.40	575.11	511.36	542.92	524.16	558.36	574.74
Trackage—N. C. & St. L. Ry. Co.—Stevenson—Wauhatchie	270.20	344.88	348.57	352.00	424.16	335.44	318.68	316.96
Total Direct Expenses—"Apportioned"	$7,092.17	$7,025.12	$7,468.45	$7,229.34	$7,576.25	$7,406.16	$7,314.72	$7,464.36
Total Direct Expenses—"Actual and Apportioned"	$14,217.51	$14,017.71	$14,304.83	$13,913.31	$14,513.85	$14,305.40	$14,058.62	$14,928.04
Direct Expenses in Excess of Revenues	$6,682.02	$6,864.69	$6,625.19	$6,280.70	$6,370.02	$5,146.64	$6,573.81	$7,347.11

Schedule 3

Tuscumbia, Ala.

mber 47	October 1947	November 1947	December 1947	January 1948	February 1948	Total 12 Months
07.44	$5,579.20	$4,407.78	$5,744.79	$5,531.22	$3,047.66	$66,225.02
85.51	1,984.16	1,938.86	1,989.88	1,987.84	1,856.85	23,602.01
....	.....	1,470.47	2,651.50	2,269.66	2,521.66	8,913.29
1.86	17.57	14.41	32.15	7.86	1.24	102.60
84.81	$7,580.93	$8,831.52	$10,418.32	$9,796.58	$7,427.41	$98,842.92
07.60	$4,024.34	$4,107.53	$4,302.78	$7,377.50	$4,124.60	$48,726.91
62.07	270.20	272.21	272.21	249.37	221.37	3,157.61
84.23	2,769.14	3,229.98	4,123.68	3,534.66	3,095.46	35,239.53
....	400.00	.....	.....	.....	.....	400.00
43.90	$7,463.68	$7,609.72	$8,698.67	$8,161.53	$7,441.43	$87,524.05
33.60	$964.72	$903.60	$884.12	$948.91	$877.83	$10,574.49
43.14	147.90	143.14	147.90	147.90	138.36	1,743.48
43.94	252.06	243.94	252.06	252.06	235.80	2,971.32
32.04	136.44	132.04	136.44	136.44	127.64	1,608.38
19.94	3,637.26	3,519.94	3,637.26	3,637.26	3,402.60	42,876.12
59.61	449.98	522.54	642.45	624.16	563.68	6,029.91
31.92	31.24	36.28	44.62	43.34	39.15	418.75
25.53	25.00	31.04	35.69	34.68	31.31	337.02
47.96	928.06	1,077.76	1,325.07	1,287.32	1,162.57	12,436.70
58.36	574.74	653.91	592.74	660.48	736.28	6,989.82
48.68	316.96	302.79	368.38	346.48	315.08	4,043.62
14.72	$7,464.36	$7,566.98	$8,066.73	$8,119.02	$7,630.30	$90,029.61
58.62	$14,928.04	$15,176.70	$16,765.40	$16,280.56	$15,071.73	$177,553.66
73.81	$7,347.11	$6,345.18	$6,347.08	$6,483.98	$7,644.32	$78,710.74

[fol. 16] EXHIBIT B TO PETITION

NOTICE

Notice is hereby given that Southern Railway Company is filing with the Alabama Public Service Commission a petition for approval of the discontinuance of Passenger Trains Nos. 7 and 8 operated between Tuscumbia, Ala., and Chattanooga, Tenn., due to the heavy losses incurred by Southern Railway Company in the operation of said trains.

Southern Railway Company, By W. F. Cooper, Its Superintendent, Sheffield, Ala.

Dated: —— —, ——.

(Here follow 2 pasters, side folios 17 and 18)

[fol. 17]

EXHIBIT No. 2 TO COMPLAINT

Southern Railway Company

Operating Results of Passenger Train No. 7 and 8—Chattanooga, Tenn. to Tuscumbia, Ala.
March 1, 1948 to February 28, 1949

	Total 12 Months		
	Train No. 7	Train No. 8	Total
Revenues			
Passenger	$24,596.76	$15,567.92	$40,164.68
Mail	9,790.25	10,814.63	20,604.88
Express	9,582.01	9,582.01	19,164.02
Milk	.....	22.69	22.69
Total	$43,969.02	$35,987.25	$79,956.27
Direct Expenses—"Actual"			
Wages Train and Engine Crews	$25,092.91	$25,092.88	$50,185.79
Payroll Tax—R. R. Retirement & Unemp. Ins.	1,054.42	1,054.41	2,108.83
Train Fuel	17,119.54	19,520.11	36,639.65
Injuries to Persons	325.00	482.00	807.00
Damage to Property	.....	1,252.50	1,252.50
Total Direct Expense—"Actual"	$43,591.87	$47,401.90	$90,993.77
Direct Expenses—"Apportioned"			
Enginehouse Expenses	$5,340.53	$5,283.52	$10,624.05
Pass. Locomotives—Water	888.30	881.48	1,769.78
" " —Lubricants	1,511.21	1,499.60	3,010.81
" " —Other Supplies	698.48	693.35	1,391.83
" " —Repairs	20,252.65	20,097.13	40,349.78
Pass. Train Cars —C. H. L. W. & Icing	3,097.65	3,096.63	6,194.28
" " " —Lubricants	218.15	218.07	436.22
" " " —Other Expenses	239.95	239.87	479.82
" " " —Repairs	7,569.64	7,567.13	15,136.77
Rent Paid Foreign Lines for Equipment	58.10	81.34	139.44
Trackage over N. C. & St. L.	2,335.75	2,308.41	4,644.16
Chattanooga Station Company—Expenses	3,576.95	3,535.54	7,112.49
Total Direct Expense—"Apportioned"	$45,787.36	$45,502.07	$91,289.43
Total Direct Expense—"Actual and Apportioned"	$89,379.23	$92,903.97	$182,283.20
Direct Expenses in Excess of Revenues	$45,410.21	$56,916.72	$102,326.93
Ratio—Direct Expenses to Total Revenues			228

i. e., $2.28 was expended to earn a revenue $1.00.

Items of Expense Not Included:
Maint. of Way—Tracks and Structures
Maint. of Way Supervision—Depr'n—Retmts
Maint. of Equip—Superv.—Depr'n—Retmts
All Traffic Exepnse
Station or Agency Expense
Yard of Switching Expense
Transportation—Supervision—Train Dispatching and numerous Overhead Accounts
All General Expense
All Taxes *except* Pay Roll
All Fixed Charges, i. e., Bond Interest, Rents, etc.

Note: Trains discontinued 3/21/48 thru 5/2/48 because of O. D. T. General Order No. 69

[fol. 18]

EXHIBIT No. 3 TO COMPLAINT

Southern Railway Company

Operating Results of Passenger Train No. 7 and 8—Chattanooga, Tenn. to Tuscumbia, Ala.
March 1, 1949 to July 31, 1949

	Total 5 Months		
	Train No. 7	Train No. 8	Total
Revenues:			
Passenger	$8,847.56	$5,996.52	$14,844.08
Mail	4,631.51	5,122.67	9,754.18
Express	3,062.59	3,062.59	6,125.18
Milk	.57	21.27	21.84
Total	$16,542.23	$14,203.50	$30,745.28
Direct Expenses—"Actual"			
Wages, Train and Engine Crews	$11,954.27	$11,954.26	$23,908.53
Payroll Tax—R. R. Retirement & Unemp. Ins.	499.38	499.36	998.74
Train Fuel	7,767.10	7,910.20	15,677.30
Injuries to Persons	235.00	.....	235.00
Total Direct Expenses—"Actual"	$20,455.75	$20,363.82	$40,819.57
Direct Expenses—"Apportioned"			
Enginehouse Expenses	$ 2,853.25	$2,853.25	$5,706.50
Pass. Locomotives—Water	416.98	416.51	833.49
" " —Lubricants	709.37	708.59	1,417.96
" " —Other Supplies	327.98	327.62	655.60
" " —Repairs	9,506.77	9,496.31	19,003.08
Pass. Train Cars —C. H. L. W. & Icing	1,331.81	1,336.53	2,668.34
" " " —Lubricants	93.80	94.13	187.93
" " " —Other Expenses	103.15	103.53	206.68
" " " —Repairs	3,254.50	3,266.02	6,520.52
" " " —Pullman—Air Conditioning	2.12	2.12	4.24
Trackage over N. C. & St. L.	1,639.90	1,637.98	3,277.88
Chattanooga Station Co. Expenses	1,570.05	1,566.00	3,136.05
Total Direct Expenses—"Apportioned"	$21,809.68	$21,808.59	$43,618.27
Total Direct Expenses—"Actual and Apportioned"	$42,265.43	$42,172.41	$84,437.84
Direct Expenses in Excess of Revenues	$25,723.20	$27,969.36	$53,692.56
Ratio—Direct Expenses to Total Revenues			275

i. e., $2.75 expended to earn a revenue $1.00.

Items of Expense Not Included:
Maint. of Way—Tracks and Structures
Maint. of Way Supervision—Depr'n—Retmts
Maint. of Equip.—Supervis'n—Depr'n—Retmts.
All Traffic Expense
Station or Agency Expense
Yard or Switching Expense
Transportation—Supervision—Train Dispatching and numerous Overhead Accounts
All General Expense
All Taxes *except* Pay Roll
All Fixed Charges, i. e., Bond Interest, Rents, etc.

[fol. 19]

EXHIBIT No. 4 TO COMPLAINT

Southern Railway Company

Revenue From Passengers Transported on Passenger Trains Nos. 7 and 8
Operating Between Chattanooga, Tenn. and Tuscumbia, Ala.

	Number of Days Trains Operated	Total Revenue From Passengers			Daily Average Revenue From Passengers		
		Train No. 7	Train No. 8	Total Trains Nos. 7 & 8	Train No. 7	Train No. 8	Total Trains Nos. 7 & 8
Year ended February 29, 1948	366	$40,634.12	$25,590.90	$66,225.02	$111.02	$69.92	$180.94
Year ended February 28, 1949	322	$24,596.76	$15,567.92	$40,164.68	$ 76.39	$48.35	$124.74
5 Months, Period—March 1 thru July 31, 1949	153	$ 8,847.56	$ 5,996.52	$14,844.08	$ 57.83	$39.19	$ 97.02
8 Months, Period—August 1, 1949 thru March 31, 1950	155	$ 7,856.50	$ 5,025.31	$12,881.81	$ 50.69	$32.42	$ 83.11

Note: Trains Discontinued account of O. D. T. and I. C. C. Orders.

March 21, 1948 thru May 2, 1948 ..... or 43 Days
October 26, 1949 thru November 20, 1949 ..... or 26 Days
Januay 9, 1950 thru March 11, 1950 ..... or 62 Days

Source: Southern Railway Company Records.

[fol. 20]

EXHIBIT NO. 5 TO COMPLAINT

Southern Railway Company

Actual Direct Expenses Incurred in the Operation of Passenger Trains Nos. 7 and 8 Between Chattanooga, Tenn. and Sheffield, Alabama.

	Number of Days Trains Operated	Wages Paid Train and Engine Crews	Pay Roll Taxes R. R. R. U. E. I.	Train Fuel (Coal)	Total Wages Pay Roll Tax—Fuel	Daily Average Total Wages Pay Roll Tax and Fuel
Year ended February 29, 1948	366	$48,726.91	$3,157.61	$35,239.53	$87,124.05	$238.04
Year ended February 28, 1949	322	$50,185.79	$2,108.83	$36,639.65	$88,934.27	$276.19
5 Months, Period—March 1 thru July 31, 1949	153	$23,908.53	$ 998.74	$15,677.30	$40,584.57	$265.26
8 Months, Period—August 1, 1949 thru March 31, 1950	155	$24,094.24	$1,152.73	$17,930.78	$43,177.75	$278.57

Note—Trains discontinued account of O. D. T. and I. C. C. Orders:

March 21, 1948 thru May 2, 1948 or 43 Days.
October 26, 1949 thru Nov. 20, 1949 or 26 Days.
January 9, 1950 thru Mar. 11, 1950 or 62 Days.

Source: Southern Railway Company Records.

[fol. 21] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUMMONS AND RETURN

You are hereby summoned and required to serve upon J. T. Stokely, plaintiff's attorney, whose address is 1038 Brown-Marx Building, Birmingham, Alabama, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

O. D. Street, Jr., Clerk of the Court. (Seal.)

Dated: May 3, 1950.

Received this writ at Montgomery, Alabama on May 3, 1950 and on May 4, 1950 executed by serving same on: Alabama Public Service Commission; Gordon Persons, its President; Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners by leaving a copy for each with C. C. (Jack) Owen at 523 Dexter Ave., Montgomery, Alabama, at 3:10 P.M.

Further executed on May 4, 1950, by serving same on A. A. Carmichael, Attorney General of the State of Alabama by leaving a copy with him at State Judicial Building, Montgomery Alabama, at 3:15 P. M.

Benjamin F. Ellis, United States Marshal, By Jack S. Johnson, Deputy.

[fol. 22] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF THREE-JUDGE COURT—Filed May 8, 1950

The Honorable Charles B. Kennamer, United States District Judge for the Middle District of Alabama, to whom an application for injunction and other relief has been presented in the above styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of

three judges, I hereby designate the Honorable Leon McCord, United States Circuit Judge, and the Honorable Seybourn H. Lynne, United States District Judge for the Northern District of Alabama, to serve with Judge Kennamer as members of, and with him to constitute, the said court to hear and determine the action.

Witness My Hand this 4th day of May, 1950.

J. C. Hutcheson, Jr., Chief Judge, Fifth Circuit.

(Injunctions—Three-Judge Courts—Designation, 28 U.S.C.A. Sec. 2284.)

[File endorsement omitted.]

[fol. 23] In United States District Court

[Title omitted]

Order Directing Defendants to Answer—Filed May 8, 1950

This case was by order of this court set to be heard at Montgomery, Alabama, Monday, May 22, 1950, at 10:00 A. M.

It is now made known to the court that a summons was issued by the Clerk of the court and served on the defendants by the Marshal commanding the defendants to make answer to the complaint within twenty days from the date the said summons was served by the Marshal.

It is now ordered that the defendants make answer to the bill of complaint on or before May 17, 1950, and serve a copy of said answer on the attorney for the Plaintiff, and that the cause stand for trial on May 22, 1950, at 10:00 A. M., at Montgomery, Alabama.

The Clerk of this court will deliver to the United States Marshal copies of this order to be served forthwith on the defendants.

This 8th day of May, 1950.

(S.) C. B. Kennamer, United States District Judge.

[File endorsement omitted.]

Received this writ at Montgomery, Alabama, on May 8, 1950, and on May 8, 1950 executed by serving same on: Alabama Public Service Commission; Gordon Persons, its

President; Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, by leaving a copy for each with Richard S. Brooks, Secretary of Alabama Public Service Commission, at 523 Dexter Ave., Montgomery, Alabama, at 4:30 P.M.

Further executed on May 8, 1950 by serving same on A. A. Carmichael, Attorney General of the State of Alabama by leaving a copy with him at State Judicial Building, Montgomery, Alabama, 4:45 P. M.

Benjamin F. Ellis, United States Marshal, by Jack S. Johnson, Deputy.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY CALLING OF THREE-JUDGE COURT—Filed May 15, 1950

Come the defendants in the above styled cause, without waiving any rights which they may have to object before a three judge District Court to the jurisdiction of such Court, if convoked, and move this Honorable Court to stay its call for two other Federal Judges to sit with the Judge of this Honorable Court in the hearing of the instant cause, and to decree that a three judge District Court need not be convoked in this cause, and as grounds therefor assign the following, separately and severally:

1. The initial question of whether or not a three judge District Court should be called is properly decided by the Judge of this Honorable Court, as a District Judge sitting alone.

2. The averments of the complaint filed herein as to the unconstitutionality under the Federal Constitution of the statutes involved (Tit. 48, Secs. 35 and 106, Code of Alabama 1940) are colorable and on their face without substance, in that plaintiff affirmatively states that "the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama," and admits that the allegations of unconstitutionality of the said statutes are solely for the purpose of avoiding an admission of record. (Par. IV), whereas New Title 28 U. S. C. A., Sec.

2281 does not require a District Court of three judges in such circumstances.

[fol. 25] 3. There is no substantial charge of unconstitutionality of the pertinent statutes of Alabama.

4. Charges of unconstitutionality of the pertinent statutes of Alabama are frivolous.

5. Complainant does not request an adjudication as to the constitutionality of the applicable statutes of Alabama, but on the contrary affirmatively admits that such adjudication is a matter primarily for the Supreme Court of Alabama.

6. The complaint is not directed at state officials who have authority to enforce the statutes and order here involved.

7. The complaint is not directed at officials who have taken steps to enforce the order of the Alabama Public Service Commission here complained of, and in fact it affirmatively appears from the complaint that no such steps have been taken.

8. The allegations in the complaint as to the unconstitutionality of the order of the Alabama Public Service Commission denying authority to plaintiff to discontinue the operation of its trains Nos. 7 and 8 operated between Tuscumbia, Alabama and Chattanooga, Tennessee are insufficient to warrant the convocation of a District Court of three judges.

9. Plaintiff seeks an injunction on the ground of unconstitutionality of the result obtained by the use of statutes which statutes are not attacked as unconstitutional (To-wit, Tit. 48, Secs. 35 and 106, Code of Alabama 1940).

10. Plaintiff has set forth no allegations which require adjudication of this cause by a District Court of three judges.

A. A. Carmichael Attorney General of Ala.; M. R. Nachman Asst. Atty. Gen. of Ala.; Richard T. Rives, Of Counsel for Defense; John C. Godbold, Of Counsel for Defense.

I certify that I have mailed a copy of the foregoing motion to Marion Rushton, Esq., of Counsel for Plaintiff, this the 15th day of May, 1950.

John C. Godbold, Of Counsel for Respondents.

[File endorsement omitted.]

[fol. 26] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed May 17, 1950

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action because it affirmatively appears that the plaintiff has not exhausted its administrative remedies before the Alabama Public Service Commission.

3. To dismiss the action because the averments of the complaint filed herein as to the unconstitutionality under the Federal Constitution of the statutes involved (Tit. 48, Secs. 35 and 106, Code of Alabama 1940) are colorable and on their face without substance, in that plaintiff affirmatively states that "the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama," and admits that the allegations of unconstitutionality of the said statutes are solely for the purpose of avoiding an admission of record, (Par. IV), whereas new Title 28 U. S. C. A., Sec. 2281 does not require a District Court of three judges in such circumstances.

4. To dismiss the action because there is no substantial charge of unconstitutionality of the pertinent statutes of Alabama.

5. To dismiss the action because charges of unconstitutionality of the pertinent statutes of Alabama are frivolous.

[fol. 27] 6. To dismiss the action because plaintiff does not request an adjudication as to the constitutionality of the applicable statutes of Alabama, but on the contrary affirmatively admits that such adjudication is a matter primarily for the Supreme Court of Alabama.

7. To dismiss the action because the complaint is not directed at state officials who have authority to enforce the statutes and order here involved.

8. To dismiss the action because the complaint is not directed at officials who have taken steps to enforce the order of the Alabama Public Service Commission here complained of, and in fact it affirmatively appears from the complaint that no such steps have been taken.

9. To dismiss the action because the allegations in the complaint as to the unconstitutionality of the order of the Alabama Public Service Commission denying authority to plaintiff to discontinue the operation of its trains Nos. 7 and 8 operated between Tuscumbia, Alabama and Chattanooga, Tennessee are insufficient to warrant the convocation of a District Court of three judges.

10. To dismiss the action because plaintiff seeks an injunction on the ground of unconstitutionality of the result obtained by the use of statutes which statutes are not attacked as unconstitutional (to-wit, Tit. 48, Secs. 35 and 106, Code of Alabama 1940).

11. To dismiss the action because the plaintiff has set forth no allegations which require adjudication of this cause by a District Court of three judges.

12. To dismiss the action because it seeks to enjoin the enforcement of the criminal law of the State of Alabama in a case where there has been no threat of enforcement as against the plaintiff.

13. To dismiss the action because this Honorable Court is asked in the complaint to decide issues of law and of fact the proper decision of which should be made in the state courts of the State of Alabama.

14. To dismiss the action because the decision of the Supreme Court of Alabama upon the constitutionality under the state Constitution of the statutes of Alabama and upon the construction of the statutes would be final, binding and conclusive upon all other courts, and that [fol. 28] this Honorable Court should not undertake a decision on such questions of law or of fact until the same can be decided in the state courts.

15. To dismiss the action because the plaintiff avers that the order complained of in the complaint is in violation of Tit. 48, Code of Alabama 1940, and this Honorable Court should not decide such question prior to a decision on such question by the state courts of the State of Alabama, said question being not one of constitutionality but purely a matter of state law, because a subsequent decision by the state courts of Alabama contrary to any ruling made by this Honorable Court might require modification of such ruling of this Honorable Court.

16. To dismiss the action because this Honorable — should not adjudicate in an injunction proceeding the question of whether the order complained of violates Tit. 48, Code

of Alabama 1940, because the result of an injunction by this Honorable Court, in effect, would be to bar any litigation in state courts of Alabama between the present parties with regard to the order complained of, since the defendants might be barred from enforcing the order and plaintiff would then have no reason to appeal.

17. To dismiss the action because the plaintiff has the right to appeal from the order of the Commission complained of in the complaint to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama, and that the said Circuit Court, or the Judge thereof, upon hearing and notice, after consideration of the testimony taken before the Commission, may direct that such appeal shall stay or supersede the order or action appealed from.

18. To dismiss the action because it seeks an injunction to stay proceedings in a State Court in a cause not expressly authorized by an Act of Congress in aid of the jurisdiction of this Honorable Court or to protect or effectuate its judgments.

19. To dismiss the action because there is no equity in the complaint.

[fol. 29] 20. To dismiss the action because it affirmatively appears from the complaint that the order complained of requires no affirmative action on the part of either the plaintiff or the defendants.

21. To dismiss the action because it affirmatively appears from the complaint that plaintiff seeks an injunction not against the enforcement of an order of the Alabama Public Service Commission, but rather seeks to have this Honorable Court, through the means of an injunction, give affirmative authority to plaintiff to discontinue train service without permission of said Commission, and in violation of the Alabama statutes, and without plaintiff's being subjected to the criminal laws of Alabama for so doing.

22. To dismiss the action because this Honorable Court, as a matter of sound equitable discretion, should decline to exercise its jurisdiction herein.

23. To dismiss the action because this Honorable Court judicially knows that Tit. 48, Secs. 79-93, Code of Alabama 1940 provide plaintiff with a plain, speedy, adequate and efficient remedy in the courts of the State of Alabama.

24. To dismiss the action because this Honorable Court should decline to exercise jurisdiction herein in order to

avoid needless friction with policies of the State of Alabama regarding discontinuance of railroad lines.

25. To dismiss the action because this Honorable Court should restrain its authority and jurisdiction because of scrupulous regard for the rightful independence of state governments.

26. To dismiss the action because a decision of the courts of the State of Alabama may prevent there being any necessity for a decision on federal constitutional grounds.

27. To dismiss the action because this Honorable Court should decline to exercise jurisdiction in order to avoid the possibility of a situation where state officials could no longer enforce the order against the plaintiff herein and thus be barred from testing the matter in the state courts of Alabama.

[fol. 30] A. A. Carmichael, Atty. General of Alabama; M. R. Nachman, Asst. Atty. Gen. of Alabama; Richard T. Rives, of Counsel for Defense; John C. Godbold, of Counsel for Defense, Attorneys for Defendants.

I certify that we have mailed a copy of the foregoing to Marion Rushton, Esq., of Counsel for Plaintiff.

John C. Godbold, of Counsel for Defendants.

[File endorsement omitted.]

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

DEFENDANTS' ANSWER TO COMPLAINT—Filed May 17, 1950

Come the defendants, jointly, severally and separately, and without waiving the motion to dismiss the complaint or any ground thereof, do expressly insist thereon, nevertheless for answer to the complaint plead and say:

1. They admit the allegations of paragraph I of the complaint.

2. They admit the allegations of paragraph II of the complaint except that they neither admit nor deny that the defendant Alabama Public Service Commission is an administrative as opposed to a judicial body.

3. They admit that this suit is of a civil nature between citizens of different states but deny that the matter in controversy exceeds, exclusive of interest and costs, the sum of $3000.00. They deny that this suit arises under the Fourteenth Amendment to the Constitution of the United States.

4. They admit that by Tit. 48, Secs. 35 and 106 of the Code of Alabama 1049, plaintiff and other common carriers by railroad are required to file an application with the Alabama Public Service Commission for a permit to abandon all or any portion of its service to the public or the operation of [fol. 32] any of its lines, property or plant which would affect the service it is rendering to the public, with certain exceptions not here pertinent, and it is further required to obtain from the Commission a permit allowing such abandonment before it can lawfully abandon operation of passenger trains, or any other service it is rendering to the public or its lines of railroad in Alabama. They deny that no standards for the guidance of the Commission are prescribed, and they aver that standards of present and future convenience and necessity are prescribed, and that such standards are as definite as are practicable and as the circumstances require or permit. They deny that the said statutes or either of them, are unconstitutional and void as an unlawful delegation of legislative power or upon any other ground. They admit that the adjudication of the constitutionality of such statutes is a matter primarily for the Supreme Court of Alabama. They admit that on, to-wit, the 13th day of September, 1948, the plaintiff filed with the Alabama Public Service Commission an application for authority to discontinue operation of local interstate passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee. They deny the averments of fact contained in said application and repeated therefrom in paragraph IV of the complaint.

5. They admit that hearing on the plaintiff's application was continued as alleged but aver that this was caused by requests from the affected public and the crowded condition of the docket of the Alabama Public Service Commission. They admit that the hearing was held on, to-wit, October 6, 1949, and a report and order were rendered on, to-wit, April 3, 1950, denying plaintiff's said application for authority to discontinue operation of the said two trains. They admit that the plaintiff offered evidence as alleged,

but they deny that the plaintiff's losses from operation of the said two trains from March 1, 1947 to July 31, 1949, was burdensome or became progressively more burdensome. They deny all the averments of fact relating to and contained in "Exhibits 1, 2, 3, 4 and 5 submitted to the Commission and made a part of the complaint herein as exhibits. They deny all other allegations of paragraph V of the complaint.

[fol. 33] 6. They deny the allegations of paragraph VI of the complaint.

7. They deny the averments of paragraph VII of the complaint.

8. They deny the averments, conclusions of fact and law and statements of opinion of paragraph VIII of the complaint, and aver that the facts are truly found and reported in the report and order of the Commission dated April 3, 1950, denying plaintiff's application for authority to discontinue operation of the said two passenger trains insofar as the same are operated in Alabama, Exhibit A hereto.

9. They deny that plaintiff has exhausted all administrative remedies available to it, and aver to the contrary that plaintiff has a full, adequate and complete administrative remedy under the laws of the State of Alabama, including the right to apply to the Commission for a rehearing. They aver that plaintiff has a further right to appeal from any final action or order of the Commission to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama, and the right to have such order or decree of the Commission set aside if the Court finds that the Commission ordered to the prejudice of the plaintiff substantially in its application of the law, or that the order or decree was based upon a finding of fact contrary to the substantial weight of the evidence. They deny that there has been or will be any confiscation of plaintiff's property.

And now having fully answered the plaintiff's complaint, the defendants pray that they may be discharged hence with their reasonable costs incurred.

A. A. Carmichael, Atty. General of Alabama; M. B. Nachman, Asst. Atty. General of Ala.; Richard T. Rives, of Counsel for Defense; John C. Godbold, of Counsel for Defense, Attorneys for Defendants.

I certify that I have mailed a copy of the foregoing answer to Marion Rushton, Esq., Montgomery, Ala., of Counsel for Plaintiff.

John C. Godbold, of Counsel for Defendants.

[File endorsement omitted.]

[fol. 34] EXHIBIT "A" TO ANSWER

State of Alabama

Alabama Public Service Commission

Montgomery 1, Alabama

SOUTHERN RAILWAY COMPANY, Petitioner

Petition: For authority to discontinue petitioner's passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee.

Docket 11988

Submitted: October 6, 1948. Decided: April 3, 1950

Appearances:

Charles Clark, Earl Eisenhart and J. T. Stokely, for petitioner.

Walter J. Price, James E. Smith, Jr., Patrick B. Harris, Vernon P. Crockett, Roy C. Wall, John B. Sockwell, E. J. Henninger, P. E. Kennamer, W. J. Kennamer and M. E. Popejoy, for protestants.

J. P. Knight, W. F. Wilson, M. H. Rodgers and A. L. Gurley, for various railway labor organizations.

MacDonald Gallion, for the State of Alabama.

REPORT AND ORDER OF THE COMMISSION

On September 13, 1948, the Southern Railway Company filed a petition requesting that it be duly authorized and permitted in the manner prescribed by law to discontinue the operation of passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, insofar as they are operated in Alabama. Petitioner submitted with

its request a statement of the revenue derived from the operation of trains Nos. 7 and 8 and the direct expenses allegedly incurred in such operation for the 12 months' period ended February 29, 1948, which purports to show such expenses to be $78,710.74 in excess of the revenue and therefore justifying its request.

By notice dated March 25, 1949, the matter was assigned for public hearing before the Commission at Huntsville, Alabama, on June 2, 1949. Upon request of representative of the affected public, the hearing was, by notice dated May 13, 1949, postponed and reset for August 4, 1949. Again by notice dated July 11, 1949, for cause shown, the hearing was postponed and reset for October 6, 1949, and accordingly held in Huntsville on that date at which time the above appearances were entered.

Trains Nos. 7 and 8 are so-called local passenger trains and operated only between Sheffield-Tuscumbia, Alabama, adjacent cities, and Chattanooga, Tennessee, daily. Train No. 8 leaves Sheffield-Tuscumbia at 5:55 a. m. and scheduled [fol. 35] to arrive at Chattanooga at 10:50 a. m. Train No. 7 leaves Chattanooga at 4:15 p. m. and scheduled to arrive at Sheffield-Tuscumbia at 9:05 p. m. According to a schedule submitted by petitioner, train No. 8 makes regular stops at all intermediate points shown, whereas train No. 7 makes regular stops at Scottsboro, Paint Rock, Huntsville, Madison, Decatur, Courtland, Town Creek and Leighton with flag stops at all other stations. The overall time between termini is approximately 5 hours for the distance of 166.4 miles. The general consist of these trains is a steam locomotive, one express car, one combination mail and baggage car, one coach divided for white and negro passengers and one coach for white passengers. The coaches are of steel construction and screened but not air-conditioned. At the hearing an operating witness for petitioner testified that the operation of the express car was discontinued about 4 months prior thereto. The record also shows that no express car was operated for at least 8 months in 1947. We presume that at the present time this particular car is not operated.

Petitioner also operates over its line between Tuscumbia and Chattanooga passenger trains Nos. 35 and 36 which run between Memphis, Tennessee and Chattanooga with train No. 35 leaving Chattanooga at 7:00 a. m. and arriving Shef-

field-Tuscumbia at 12:20 p. m. and train No. 36 leaving Sheffield-Tuscumbia at 12:40 p. m. arriving Chattanooga at 6:00 p. m. These trains are Diesel powered and obviously consist of two separate units operating in opposite directions daily and evidently passing at Tuscumbia. Clearly the schedules of these trains are not comparable to or afford the convenience of those by trains Nos. 7 and 8 with early morning service in one direction and late afternoon and evening service in the other. Petitioner also operates over this line passenger trains Nos. 45 and 46 which are Diesel powered streamliner trains between Memphis, Tennessee and Washington, D. C., train No. 45 leaving Chattanooga at 11:50 p. m. arriving Tuscumbia at 4:10 a. m. and train No. 46 leaving Tuscumbia at 11:10 p. m. arriving Chattanooga at 3:10 a. m. with regular stops at Decatur and Huntsville only and conditional stops at Scottsboro and Stevenson. All schedule times shown are Central Standard.

According to the record, of the 22 stations on the Southern Railway between Tuscumbia and Chattanooga, 14 towns and cities are incorporated with a total population of 38,985 within the incorporated limits as of the 1940 Federal Census and 8 are unincorporated with a total population of 1,375 estimated by petitioner as being within sight of the stopping place of the passenger trains. These figures, of course, do not include the outlying or farm population and that of Sheffield, Tuscumbia or Chattanooga.

[fol. 36] As petitioner's request for authority to discontinue trains Nos. 7 and 8 is based entirely upon the position that the revenues derived from the operations of these trains are not sufficient to offset the expense incurred, it has submitted in evidence statements purporting to show operating results of trains Nos. 7 and 8 for the 12 months from March 1, 1947 to February 29, 1948, inclusive, the 12 months from March 1, 1948 to February 28, 1949, inclusive, and the 5 months from March 1, 1949 to July 31, 1949, inclusive. The revenues shown are those accruing from passenger, mail, express and milk. The expenses shown are direct expenses "actual," including wages to crewmen, payroll tax, retirement and unemployment insurance, train fuel, damage to livestock on right of way, injuries to persons and damage to property of others and direct expenses "apportioned," including enginehouse expense, passenger locomotive expenses and passenger train

car expenses and also costs of trackage rights over the Nashville, Chattanooga and St. Louis Railway and use of Chattanooga Passenger Station. For the first 12 months' period the revenues are shown as $98,842.92 and expenses as $177,553.66, for the second 12 months' period, revenues as $79,956.27 and expenses as $182,283.20, and for the 5 months' period, revenues as $30,745.28, and expenses as $53,692.56 resulting in the expenses being $78,710.74, $102,326.93 and $53,692.56, respectively in excess of the revenues.

In regard to revenues, petitioner can, no doubt, determine accurately the revenue from passenger tickets sold and conductors' fares collected on these trains and can likewise accurately determine the revenue from milk. The express revenue, however, does not necessarily reflect the actual volume of such traffic handled but based upon the amounts paid to petitioner by the Railway Express Agency for express privileges. All express charges are collected by the Agency and after deducting its expenditures from the gross revenue the balance is prorated among the various railroads on a percentage basis formulated in about 1936. The proportion received by petitioner is then allocated to the trains in question on basis of the car-foot mile of space on these trains devoted to express service as related to the total car-foot miles maintained over the system. The record shows that effective June 23, 1949, the express car in trains Nos. 7 and 8 was eliminated resulting in only 5 feet of space being assigned to express with service at no intermediate point except Decatur. Therefore, the revenue now allocated to these trains from express traffic has been practically eliminated. The mail revenue is assigned on basis of contract with the Post Office Department based upon rates of pay prescribed by the Interstate Commerce Commission. An adjustment brought to attention of petitioner after the submitted revenue statements were prepared disclosed that these trains should be cred-
[fol. 37] ited with additional mail revenue for mail actually carried but not included in the contract which would, for the two 12 months' periods and the 5 months' period shown above, increase the mail pay by approximately $4,700.00, $4,100.00 and $2,000.00 respectively, thereby reducing the alleged deficits accordingly.

Included in "actual" direct expenses, petitioner has shown wages paid train and engine crews including payroll

tax and retirement and unemployment insurance. A crew consists of engineer, fireman, baggagemaster, conductor and flagman with a porter on Saturdays and Sundays. Two full crews are used with one crew making a round-trip one day and laying off the next. By using the period March 1, 1948, to February 28, 1949, as fairly representative, which is the latest full 12 months period shown, the wages for crew members, including tax, etc., amounted to $52,294.62. During this same period the total revenues were $84,056.27, including $4,100.00 added to the mail pay, or $31,761.65 in excess of wages actually paid for handling these trains. The other expenses in this period and shown as actual include train fuel, injuries to persons and damage to property amounting to $36,639.65, $807.00 and $1,252.50 respectively. The above cost for coal represents an average of $100.38 per day for the round-trip distance of 333 miles or 30.1 cents per mile. In a recent proceeding before the Commission involving a major railroad operating in Alabama seeking authority to discontinue an almost identical type of passenger service the per day cost for coal for fuel was shown as $60.35 for a round-trip of 224 miles or 26.9 cents per mile and reflecting the 1948 average costs. Assuming the latter to be a reasonable average in Alabama for steam locomotives used in local passenger trains of three or four cars, the expense for train fuel on trains Nos. 7 and 8 would have been $89.91 per day or $32,817.15 for the 365 days instead of $36,639.65, a difference of $3,822.50. It is true that operating conditions will vary within the State but the above clearly indicates that a slight difference in computing the cost per locomotive mile will produce a very wide difference over a period of 12 months involving many thousands of locomotive miles. Petitioner avers that the figure shown represents the cost of fuel actually consumed by these trains. In other similar proceedings petitioners have taken the position that the fuel consumed by locomotives on a particular run cannot be accurately determined except in isolated cases where the locomotives used on a run are the only ones taking coal from a particular stock pile or chute. If the latter is true in this case it is not shown by the record. Nevertheless, the cost of train fuel constitutes a considerable item in operation of trains Nos. 7 and 8 indicating a rather large steam locomotive. Petitioner has submitted in evidence a photograph of the equipment generally used in these trains. This photograph shows locomotive No. 6317 which appears to have a

[fol. 38] 2-8-2 wheel arrangement, that is, two small wheels in front, eight drivers and two small wheels under the cab. If true, it is known as a Mikado type and capable of pulling considerably in excess of the usual consist of these trains. According to our information, the above locomotive, exclusive of tender, weighs 288,000 pounds or 144 tons. In 1947 the average weight of all steam passenger locomotives, exclusive of tenders, used in the Southern Region was 146 tons, therefore, this locomotive closely approximates the average size used in all types of steam propelled passenger train service in the southeast. In 1947 the average for the United States of such passenger locomotives was 145 tons and in 1937 was 129 tons indicating a trend toward purchasing larger locomotives and retiring small ones resulting in increased operating costs on short and light local passenger trains unless small units are retained for such service. In view of the locomotive in question being about the average weight it does appear that smaller and less expensive units should be available for this type of service.

For the above period petitioner has charged these trains with a total of $2,059.50 for injuries to persons and damage to property represented as actually incurred in such operation. While this amount can be directly attributable and incidental to the operation, it is entirely possible that such expense was caused by negligence on the part of petitioner's employees and therefore some question exists as to whether it should be used as an item of expense for the purpose of discontinuing the service to the public or absorbed by the railroad as a self-insurer.

In regard to direct expenses "apportioned" during this 12 months period petitioner has shown an amount of $10,624.05 for enginehouse expenses. It is our understanding that apportioned expenses reflect more or less a system average arrived at on basis of the mileage each type or class of equipment included in each category of expense is operated. We have no means of checking the costs of operation submitted by petitioner except from its Annual Report to this Commission for the year 1948 and which does not contain statistics of rail-line operations separated between steam passenger train operations and other than steam, therefore, this would only provide a general overall average. During this year petitioner's principal helper and light locomotives in passenger service operated a total of 10,445,618 locomotive miles. During the 12 months period here

considered, largely in 1948, trains Nos. 7 and 8 operated 322 days, having been discontinued March 21, 1948 thru May 2, 1948, for a total of 107,266 locomotive-miles or 01.0265 percent of the system figures. For 1948 the total enginehouse expense under Account 400 was $904,168 attributable to passenger service. The above percentage of this expense is $9,281.27 or $1,342.78 less than the amount [fol. 39] claimed by petitioner. This group of apportioned expenses includes under passenger locomotive amounts of $1,769.78 for water, $3,010.81 for lubricants and $1,391.83 for other supplies. The system total for these items in 1948 were $94,179, $257,761 and $89,454 respectively under Accounts 397, 398 and 399. The above percentage of these expenses are $966.75, $2,645.92 and $918.25 or $803.03, $364.89 and $473.58 less than the amounts shown by petitioner. For passenger locomotive repairs petitioner has allocated $40,349.78 which it submits is based on a study of the class or heavy repairs and light or running repairs made for the past six or seven years on the locomotive used on this run and the costs divided by the miles operated between shopping to arrive at an average per mile. This average is then multiplied by the miles operated during the period shown. The above figure is somewhat less than that based on the system average for 1948. It is our understanding, however, that the Association of American Railroads accepts 86 percent of the average costs for locomotive repairs as representative of the proportion affected by use as some locomotive in service remain idle for a portion of the time. On this basis the above figure should be $34,700.81 for such repairs or $5,648.97 less than shown.

Admittedly the above comparisons for enginehouse expense and for locomotive water, lubricants and other supplies involves the passenger locomotive operations of petitioner as a whole, nevertheless, it is not unreasonable to question why the cost of these items in operating the locomotive on trains Nos. 7 and 8 should be greater than the average for the entire system.

For this period the five items of apportioned expenses discussed above are shown by petitioner to total $57,146.25. On basis of the system averages for enginehouse expense, locomotive water, lubricants and other supplies and 86 percent of the average cost of locomotive repairs, the total of the five items would be $48,513.00 or $8,633.25 less than computed by petitioner. We are unable to check from petition-

er's annual report for 1948 the system average expense on passenger train cars for cleaning, heating, lights, lubricants, etc., except that for passenger train car repairs which includes all types of such equipment. This average per car-mile for the total car miles operated on trains Nos. 7 and 8 reflects an amount slightly higher than the $15,136.77 shown by petitioner, however, it is also our understanding that the commonly accepted basis for computing the cost affected by use is 50 percent of the average as passenger train cars are idle a large portion of the time. On this basis the amount shown by petitioner would be considerably reduced.

As previously shown, the period dealt with above is the 12 months from March 1, 1948 to February 28, 1949, inclusive, during which these trains were discontinued on March 21, 1948, through May 2, 1948 pursuant to O. D. T. [fol. 40] General Order No. 69. In this period petitioner shows its revenues were $79,956.27 and direct expenses, actual and apprortioned, were $182,283.20 resulting in the expenses being $102,326.93 in excess of the revenues. Assuming this to be correct it should be borne in mind that if the trains in question are discontinued this amount would not revert to petitioner in the form of a saving as approximately 38 or 40 percent of any amount saved will be absorbed by additional income tax.

The other two periods covered in the record will not be discussed in detail. During the 12 months from March 1, 1947 to February 29, 1948, petitioner shows its revenues to be $98,842.92 and expense $177,553.66 or a difference of $78,710.74. During the five months period from March 1, 1949, to July 31, 1949, the revenues are shown as $30,745.28 and expenses as $84,437.84 making a difference of $53,692.56. The average revenues per day during the three periods were $270.06, $248.31 and $200.95 respectively indicating a progressive decrease while the direct expenses, according to petitioner, averaged $485.12, $566.10 and $551.88 respectively, per day, indicating an appreciable increase in the second period and slight decrease in the third period.

The purpose of the previous comparisons in the second period of the apportioned expenses as shown by petitioner and those arrived at by using averages in the annual report or otherwise, is not an attempt on the part of the Commission to determine what the proper expenses should be, but to show that different methods of computing such costs could well produce different results. In this case the result would

appear to be several thousands of dollars less than shown. Without painstaking study by special accountants of petitioner's records over a period of time, the Commission could not be in a position to determine with any degree of accuracy whether or not petitioner has submitted cost figures closely reflecting the actual results of operating trains Nos. 7 and 8, nevertheless, it is our considered opinion that under the circumstances reliance upon the alleged costs as being true and correct would necessarily be in the light of absolute maximum expenses rather than the minimum expenses, thereby casting a degree of doubt upon their true value.

In view of petitioners position that the cost of operating the present type of trains Nos: 7 and 8 is not commensurate with the revenue, protestants have inquired why a comparatively small Diesel electric train formerly operated on this line was discontinued. This train consisted of one complete unit containing a motive power, a mail compartment and a baggage compartment and with an attached trailer car partitioned for white and colored passengers. This equipment was placed in service on the line between Sheffield and Chattanooga in 1939 at which time petitioner purchased six complete units at approximately $90,000 each. [fol. 41] Obviously the running costs of these trains would be considerably less than the present equipment, however, petitioner contends that the Diesel units did not prove as satisfactory as expected due to certain mechanical difficulties encountered in operation necessitating frequent shopping and therefore requiring steam stand-by equipment. Nevertheless, this Diesel unit was used on this run for several years and then transferred to another division where other such units were in service. Regardless of frequent shopping we are convinced that had this light Diesel equipment been retained on this line, the operating expenses here shown for the type of equipment now used would be substantially less, not only, in mechanical operating costs but also in wages, despite the fact that no costs are shown in the record during the time Diesel power was used. In fact we are inclined to the opinion that this change was a forethought toward ultimate discontinuance of trains Nos. 7 and 8.

Petitioner has stressed the decline in the volume of passenger travel which it attributes to a great extent to highway travel by motor bus and private automobile. Paved highways closely paralleled or are adjacent to the right-of-

way of petitioner between Bridgeport and Tuscumbia with frequent daily bus schedules, however, several towns are located from one to two miles from the main highway. No question exists as to the increase in the number and use of private automobiles since the war. It seems to us that the railroads generally have resigned themselves to the fact that this competition must be accepted in a docile manner without attempting to meet it in a substantial and earnest effort. It has been our observation that in many cases the public prefers the safety of rail transportation provided same is comfortable and otherwise attractive. Where railway passenger service of long standing, such as here involved, is discontinued there is always present, unfortunately, a certain element or group of people who, because of their circumstances or location, must of necessity depend entirely upon rail service. While this group is perhaps of itself not sufficiently large to warrant such continued service, it must depend upon the support of others not so unfortunately situated. The only way this support can be obtained is by rail service so attractive and desirable as to meet competing factors.

In 1948 the Interstate Commerce Commission realized fully the inroads that competitive modes of transportation were making in carriers revenue when it stated on page 3 of its Sixty-Second Annual Report to the Congress as follows:

> "While not unmindful of the many efforts which the railroads individually and to some extent collectively are making to increase the efficiency of particular operations, and while appreciative of the fact that most railroads face difficulties in securing outside funds with which to effect cost-reducing fixed improvements, we are of the view that much more must be done to increase the efficiency and reduce the costs of railroad opera- [fol. 42] tions. Opportunities of this kind extend from the multitude of minor day-to-day operations to large-scale changes in practices which require both careful planning and substantial capital investments. Lapses in operating procedures which lower standards of service are costly to correct and discourage the use of rail service. A thorough searching out of better ways of doing these lesser things which constitute a railroad's days work must be undertaken. Bold experimentation

with new devices and methods seem also to be required in some instances. * * * Imagination and ingenuity must be brought to the task. The responsibility for effecting improvements lies directly with the railroads. It will be our purpose, however, to furnish such help as may be possible."

We are not convinced that the railroads generally have taken this admonition as seriously as they should. It appears that they have largely elected to depend upon the Interstate Commerce Commission granting relief in the form of increased fares as indicated in the last sentence above but experience with such procedure has not resulted in increased passenger revenues but discouraged patronage. Effective July 1, 1949, the passenger fare in coaches in Alabama was permitted to be increased from a base of 1.65 cents per mile to 2.5 cents per mile. According to our information this has not produced favorable results. Therefore, two other alternatives remain, either that of discontinuing all such passenger service as here involved or cause available economies to be invoked. To do the first would seriously affect the public need and welfare in many sections of the south where the continued growth, prosperity and well being of communities depend almost entirely upon rail transportation for their people, their express and their mail. In regard to economies, we firmly feel that in this case the petitioner has made no attempt to explore the possibilities of a more economic operation but has steadfastly maintained an expensive operating level. This is indicated by the fact that it discontinued the use of a light Diesel unit which unquestionably was rendering adequate and attractive service and substituted a much heavier and expensive steam operation and the fact that with the exception of the six light Diesel units previously mentioned and purchased in 1939, it has not made nor does it appear that it intends to make any experiments with low cost passenger train equipment.

The basic foundation of a railroad is its service to the public and which must be adequate and efficient for its survival. Realizing this and in view of the tremendous effect that competing forms of transportation have been having upon the railroad passenger operations, which competition has been growing steadily in the past few decades and will continue to do so as long as the railroads persist in utilizing

equipment which was standard many years ago, the manufacturers of railroad passenger equipment have for the past few years been developing better, more efficient and more attractive passenger units and yet involving smaller investments and lower operating costs, which the primary purpose [fol. 43] of enabling the railroad to continue to serve the public adequately and efficiently, particularly in its comparatively short haul or local operations as is here the case.

One such company, The Budd Company of Philadelphia, Pennsylvania, has recently placed on the market a Diesel operated passenger coach which contains its own power unit and can be operated independently or as many units as desired can be operated into a train. Each unit is 85 feet long and is made in three types. One is strictly a coach seating 90 passengers, another is a combination baggage and passenger unit seating 71 passengers and the other is a combination Railroad Post Office, baggage and passenger unit seating 49 passengers. These units, either single or in combination, can be satisfactorily operated in either direction eliminating the expense and necessity of turning the entire train at terminals. In our opinion, the latter mail, baggage and passenger unit would, with minor modifications, be suitable for operation on the line involved in this proceeding.

This unit now costs $129,220.00 and, according to cost studies made, can be operated in units of two, at approximately 73 cents per train mile. Three men would be the maximum crew required. The above information was obtained directly from the manufacturer.

In dealing with the matter of an economic operation it is not our purpose to attempt to dictate the managerial policy of the railroad but to point out that such matters could and should be thoroughly and carefully investigated before the public is deprived of a needed service and the "bold experiments" if necessary should be invoked. In this case, as we have stated, no such attempt has apparently been made. Therefore, the public and the Commission is entitled to know whether or not a service can be made to bear its costs or to yield a profit before it should be summarily discontinued. Until such a showing is made by petitioner that it has found experimentation with other devices or other available avenues of economy are ineffectual, we will view with reluctance a request to abandon a service meeting a public need.

Upon careful consideration of all the evidence, we find that the present and future public convenience and necessity are not shown to permit the discontinuance of petitioner's passenger trains Nos. 7 and 8, that an element of doubt exists as to the extent to which petitioner alleges it is sustaining losses in the operation of said passenger trains and that petitioner has not attempted to fulfill its duty to the public by exercising available economies to offset any losses that may be incurred in such operation to which the public is justly entitled in order that its needs may not be jeopardized.

[fol. 44] The premises considered:

It is ordered by the Commission, That the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, insofar as they are operated in the State of Alabama, be and it is hereby denied.

Dated at Montgomery, Alabama, this the 3rd day of April, 1950.

Alabama Public Service Commission, Gordon Persons, President; Jimmy Hitchcock, Associate Commissioner; C. C. (Jack) Owen, Associate Commissioner.

Attest:

A true copy. Richard S. Brooks, Secretary.

[fol. 45] In the United States District Court

[Title omitted]

Motion to Stay Further Action—Filed May 17, 1950

The defendants move this Honorable Court to stay any further actions, orders, or decrees in this cause pending the determination in the State courts of the State of Alabama of the appeals which may be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, and as grounds therefor assign the following:

1. That this Honorable Court is asked in the complaint to decide issues of law and of fact the proper decision of which should be made in the state courts of the State of Alabama.

2. That the decision of the Supreme Court of Alabama upon the constitutionality under the state Constitution of the statutes of Alabama and upon the construction of the statutes would be final, binding and conclusive upon all other courts, and that this Honorable Court should not undertake a decision on such questions of law or of fact until the same can be decided in the state courts.

3. That the plaintiff avers that the order complained of in the complaint is in violation of Tit. 48, Code of Alabama 1940, and this Honorable Court should not decide such question prior to a decision on such question by the State Courts of the State of Alabama, said question being not one of constitutionality but purely a matter of state law, and a subsequent decision by the state courts of Alabama contrary to any ruling made by this Honorable Court might require modification of such ruling of this Honorable Court. [fol. 46] 4. This Honorable Court should not adjudicate in an injunction proceeding the question of whether the order complained of violates Tit. 48, Code of Alabama 1940, because the result of an injunction by this Honorable Court, in effect, would be to bar any litigation in state courts of Alabama between the present parties with regard to the order complained of, since defendants might be barred from enforcing the order and plaintiff would then have no reason to appeal.

5. That the plaintiff has the right to appeal from the order of the Commission complained of in the complaint to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama, and that the said Circuit Court, or the Judge thereof, upon hearing and notice, after consideration of the testimony taken before the Commission, may direct that such appeal shall stay or supersede the order or action appealed from.

6. That no action has been taken by any of the State officers of Alabama to enforce said order.

Further, the defendants move this Honorable Court to stay any further actions, orders or decrees in this cause pending the determination by the Supreme Court of the United States of an appeal in the case of Alabama Public Service Commission, et als., appellant versus Southern Railway Company, a corporation, appellee, decided by a three-judge federal court of this district by decree of February —, 1950.

A. A. Carmichael, Attorney General of Alabama. M. R. Nachman, Asst. Atty. General of Alabama. Richard T. Rives, of Counsel for Defense. John C. Godbold, of Counsel for Defense, Attorneys for Defendants.

I certify that we have mailed a copy of the foregoing motion to Marion Rushton, Esq., of Counsel for Plaintiff.
John C. Godbold, of Counsel for Defendants.

[File endorsement omitted.]

[fol. 47] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed September 18, 1950

To the Honorable Charles B. Kennamer, Judge of the District Court of the United States for the Middle District of Alabama, Northern Division:

Considering themselves aggrieved by the final decree and judgment of this Honorable Court entered on July 20, 1950, the Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. A. Carmichael, as Attorney General of the State of Alabama, the defendants herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said defendants, and that the amount of security for costs be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final judgment and decree was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

Respectfully submitted, A. A. Carmichael, Attorney [fol. 48] General of Alabama. Wallace L. Johnson, Assistant Attorney General of Alabama. Richard T. Rives, of Counsel for Defendants-Appellants. John C. Godbold, of Counsel for Defendants-Appellants.

[File endorsement omitted.]

[fol. 49] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 18, 1950

The Alabama Public Service Commission, Gordon Persons, as its President, Jimmy Hitchcock and C. C. (Jack) Owen, as Associate Commissioners, and A. C. Carmichael, as Attorney General of the State of Alabama, the defendants herein, having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment and decree of this Court in this case entered on July 20, 1950, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, therefore, it is hereby ordered that said appeal be and the same is hereby allowed as prayed for.

It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $500.00 with good and sufficient surety, and shall be conditioned as may be required by law.

It is further ordered that citation shall issue in accordance with the law.

Done this 18 day of September, 1950.

C. B. Kennamer, Judge.

[File endorsement omitted.]

[fol. 50] Citation in usual form, filed Sept. 18, 1950, omitted in printing.

[fol. 51] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed September 18, 1950

Alabama Public Service Commission; Gordon Persons, its President; Jimmy Hitchcock and C. C. (Jack) Owens, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, defendants in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered on July 20, 1950.

The District Court of the United States for the Middle District of Alabama, Northern Division (single judge) erred:

1. In failing and refusing to grant defendants' motion to stay the call of a three-judge federal court, which motion was filed on, to wit, the 15th day of May, 1950, and overruled and denied by the three-judge court on July 20, 1950.

The three-judge District Court of the United States for the Middle District of Alabama, Northern Division erred:

1. In overruling and denying the motion of the defendants to dismiss the action, which motion was overruled and denied on July 20, 1950.

2. In overruling and denying the motion of the defendants to stay the action pending determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, which motion was overruled and denied on July 20, 1950.

[fol. 52] 3. In rendering the final decree rendered on July 20, 1950.

4. In assuming jurisdiction of this cause.

5. In exercising jurisdiction of this cause.

6. In proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of

the appeals which might be taken by the plaintiff from the order or decree of the Alabama Public Service Commission complained of in the complaint.

7. In vacating and declaring null and void and of no effect the order of the defendant Alabama Public Service Commission dated April 3, 1950.

8. In assuming jurisdiction to enjoin enforcement of the criminal law of the State of Alabama.

9. In decreeing that a permanent injunction be issued, enjoining the defendants and each of them, and their successors in office and their agents and attorneys, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of the order of the Alabama Public Service Commission dated April 3, 1950, denying plaintiff authority to abandon certain train service, or to enforce any penalties, fines, forfeitures or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing operation of certain passenger trains between Tuscumbia, Alabama, and Chattanooga, Tennessee, insofar as they are operated within the State of Alabama.

Wherefore, defendants pray that the said decree of the District Court be reversed and that said Court be ordered to enter a decree dismissing said action, or else to enter a decree staying any further actions, orders or decrees pending the determination in the Alabama Public Service Commission and in the courts of the State of Alabama of the petitions and appeals which might be filed by the plaintiff relating to the matters complained of in the complaint, and that the defendants be awarded their costs.

[fols. 53-63] A. A. Carmichael, Attorney General of the State of Alabama; Wallace L. Johnson, Asst. Attorney General of the State of Alabama; Richard T. Rives, of Counsel for the Defendants; John C. Godbold, of Counsel for the Defendants.

[File endorsement omitted.]

[fol. 64] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, a Corporation, Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed July 20, 1950

Before McCord, Circuit Judge, Kennamer and Lynne, District Judges

LYNNE, District Judge:

Resting the jurisdiction of the district court upon the Federal question and amount in controversy provisions of Title 28, Section 1331, U. S. C. A., or upon the diversity of citizenship and amount in controversy provisions of Title 28, Section 1332, U. S. C. A., and that of a district court of three judges upon the provisions of Title 28, Section 2281, U. S. C. A., plaintiff, a Virginia corporation, complained of the Alabama defendants and prayed for both temporary and permanent injunctive relief against them.

Plaintiff's basic insistence is that the revenue derived from the operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, is grossly disproportionate to the direct expenses and that the continuation of such train service is not demanded or required by the public necessities.

Alleging the exhaustion of administrative remedies, plaintiff exhibits its petition for a permit allowing abandonment of such service, filed with defendant, Alabama Public Service Commission, September 13, 1948, pursuant to the requirements of Title 48, Sections 35 and 106, Code of Alabama, 1940. There follow averments calculated to show undue delay in the hearing and consideration of the petition culminating in an adverse order entered by defendant Commission on April 3, 1950.

Emphasizing the impact of the Commission's order within the framework of the statutory scheme of regulating trans-
[fol. 65] portation companies, Title 48, Code of Alabama, 1940, plaintiff makes clear that it is impaled on the horns of a dilemma. If it continues the operation of such trains, it will lose substantial sums of money. If it ignores the Commission's order and abandons such services, it will face the imposition of severe sanctions under pertinent statutes. Either course, it complains, will result in irreparable damage unless this court grants injunctive relief.

Following the constitution of a three-judge district court in conformity with the provisions of Title 28, Section 2281, U. S. C. A., this action was, on May 8, 1950, set down for a hearing on plaintiff's prayer for a temporary injunction at Montgomery, Alabama, on May 22, 1950.

Upon its convocation, this court was met at the threshold with three several motions, in which all defendants joined, raising certain adjective problems relating to the jurisdiction of the court, the propriety of exercising such jurisdiction as it might be found to have, and the right of plaintiff to injunctive relief in any event.

At the conclusion of oral arguments, the court, after consultation, announced its opinion that each of such motions was due to be overruled for reasons thereafter to be stated. Whereupon, it was stipulated by counsel for the parties that evidence should be adduced and the case submitted upon plaintiff's prayer for a permanent injunction.

I. Adopting a literal construction of the following language of Title 28, Section 2281, U. S. C. A.:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

defendants challenge the jurisdiction of this District Court of three judges because no attack is leveled at the constitu-

tionality of the State statutes under which the defendant Commission acted. Since, it is argued, plaintiff does not seek an adjudication of unconstitutionality of such statutes but relies squarely upon the assertion that the order of the [fol. 66] defendant Commission denying plaintiff the right to abandon the passenger train service concerned is confiscatory in effect and therefore violative of the Fourteenth Amendment to the Constitution of the United States, the quoted statute is manifestly inapplicable.

Dispositive of this contention is *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. E. 659 (1923), in which Mr. Justice Holmes, delivering the opinion for a unanimous court, stated:

> "A doubt has been suggested whether these cases are within Sec. 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is construed with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed repeatedly that the section was to be taken more broadly. Louisville & Nashville RR. Co. v. Finn, 235 U. S. 601, 604. Phoenix Ry. Co. v. Geary, 239 U. S. 277, 280, 281. Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U. S. 212. Western & Atlantic R. R. v. Railroad Commission of Georgia, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 301, 318. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555. Grand Trunk Western Ry.

Co. v. Railroad Commission of Indiana, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mentioned the matter simply to put doubts to rest."

We hold that a Federal three-judge district court has jurisdiction to entertain a complaint alleging the unconstitutionality of an order of an administrative board or commission, acting under a State statute and praying for injunctive relief against the enforcement, operation or execution of such order, although no attack is made upon the validity of the statute itself.[1]

[fol. 67] II. Insisting that this court should herein decline to exercise its jurisdiction, defendants first invoke the familiar doctrine of exhaustion of administrative remedies. Pointing to the provisions of Title 48, Section 79, et seq., Code of Alabama, 1940, defendants assert that the appellate procedure therein provided is a part of the administrative process.

We do not agree. In *Avery Freight Lines, Inc.* v. *Persons* 250 Ala. 40, 32 So. 2d 886 (1947), the Supreme Court of Alabama, in holding that an appeal to the Circuit Court under the statutes concerned was judicial and not legislative or administrative, observed:

"Under the foregoing statutes • • • the circuit court can do only three things. (1) It can affirm the order of the Public Service Commission. (2) It can set aside the order of the Public Service Commission. (3) It can remand the case to the Public Service Commission for further proceedings in conformity with the direction of the court. The legislature evidently did not intend that the reviewing court should put itself in the place of the commission, try the matter anew as an administrative body, weigh the evidence and substitute

[1] *Herkness* v. *Irion. Comm. of Conservation, et al.*, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198 (1928);
Ex Parte Williams, Tax Comm., 277 U. S. 267, 48 S. Ct. 523, 72 L. Ed. 877 (1928);
Prendergast, et al., v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);
Louisville & N. R. Co. v. *Railroad Comm. of Ala.*, 208 Fed. 35 (D. C. Ala. 1913).

its finding and judgment on the merits as that of the commission." State v. Public Service Commission, 234 Mo. App. 470, 134 S. W. 2d 1069, 1076; Id., 348 Mo. 613, 154 S. W. 2d 777; 51 C. J. p. 758. See Alabama Public Service Commission v. Crow, 247 Ala. 120, 22 So. 2d 721."

After discussing a similar statutory design for judicial review of administrative orders in *Bacon, et al. Public Service Comm. of State of Vermont* v. *Rutland Railroad Co.*, 232 U.S. 134, 138, 34 S. Ct. 283, 58 L. Ed. 538 (1914), the court said:

"It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case), is immaterial; the remedy in any event is purely judicial; to exonerate the appellant from an order that exceeds the law. This, we understand, is the view taken by the Supreme Court of the State, Bacon v. Boston & Maine R. R. 83 Vermont, 421, 457; Sabre v. Rutland R. R. Co., 86 Vermont, 347, 368, 369, and this being so, by the rule laid down in Prentis v. Atlantic Coast Line Co., the railroad company was free to assert its rights in the District Court of the United States."

We hold that defendant Commission's order denying plaintiff's petition terminated the administrative process, [fol. 68] entitling plaintiff to resort immediately to this court for relief.[2] The failure of plaintiff to apply for a rehearing does not affect the result. Title 48, Section 76,

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[2] *St. Louis-San Francisco Railway Co.* v. *Ala. Public Service Comm.*, 279 U. S. 560, 49 S. Ct. 383, 73 L. Ed. 843 (1929);

Prendergast, et al. v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);

Bacon, et al. Public Service Comm. of State of Vermont v. *Rutland Railroad Co.*, 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538 (1914);

Code of Alabama, 1940, permits an application for a rehearing before the Commission but does not require it. No Alabama case has been called to our attention, we have found none, holding that such an application must have been made before resorting to the statutory procedure for appeals to the State courts, to which we have referred. Moreover, in the absence of a statutory requirement making application for a rehearing a condition precedent to the right of judicial review, plaintiff was authorized to proceed in this court without first having availed itself of such a privilege.[3]

There is no merit in defendants' insistence that plaintiff must perforce litigate the validity of the alleged confiscatory order in the State courts. Jurisdiction of this court has been invoked by facts properly pleaded. Plaintiff had a choice of forums. It could have prosecuted an appeal to the Circuit Court of Montgomery, Alabama (Title 48, Section 79, Code of Alabama, 1940) or it could have invoked the jurisdiction of this court in a plenary suit. We hold that, after the judicial stage is reached, a complainant alleging an order of a State commission to be confiscatory in violation of the Fourteenth Amendment may seek the protection of a Federal court even though the State law affords like procedure in the State courts.[4]

Chicago B. & Q. R. Co. v. *Illinois Commerce Comm.*, 82 F. Supp. 368 (D. C. Ill., 1949);

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina*, 77 F. Supp. 675 (D. C. S. C. 1948).

[3] *Prendergast et al.* v. *New York Telephone Co.*, *supra*, note 2.

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina*, *supra*, note 2.

[4] *Railroad Warehouse Comm. of Minnesota* v. *Duluth Street Ry. Co.*, 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807 (1927);

Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 44 S. Ct. 553, 68 L. Ed. 795 (1924);

Prendergast v. *New York Telephone Co.*, *supra*, note 2.

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659 (1923);

Detroit & Mackinac R. R. Co. v. *Michigan R. R. Comm.*, 235 U. S. 402, 35 S. Ct. 126, 59 L. Ed. 288 (1914);

[fol. 69] Conceding *arguendo* its jurisdiction, defendants urge this court to obstain from its exercise both under the principle of comity between Federal and State courts and under the doctrine of discretionary abstention. But "rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co.* v. *Russell, supra,* 261 U. S. 290, 293. Since no suit is pending at this time in any of the courts of the State of Alabama between the parties to, or involving the subject matter of, this litigation, we hold that rules of comity are inapplicable. *Southern Railway Co.* v. *Alabama Public Service Comm.*, 88 Supp. 441 (1950).

There is ample authority to the effect that if questions of novel, ambiguous or undecided State law are involved in a pending action and it appears that a State court adjudication would decide or render unnecessary the decision of Federal questions, the Federal court should retain jurisdiction but withhold its decision pending determination of the matter by the State court with reasonable promptness.[5] We agree that the district court should stay its hand

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Bacon v. *Rutland Railroad Co.*, *supra*, note 2.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894);

Central Kentucky Natural Gas v. *Railroad Comm. of Ky.* 37 F. 2d 938 (1930);

Union Light, Heat & Power Co. v. *Railroad Comm.*, 17 F. 2d 143 (1926);

Van Wert Gaslight Co. v. *Pub. Utilities Comm. of Ohio*, 299 Fed. 670 (1924).

[5] *Shipman* v. *Dupre*, — U. S. —, — S. Ct. —, 94 L. Ed. 537 (1950);

Railroad Comm. of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941);

Burford v. *Sun Oil C* 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943);

Stainback v. *Mo Hock Me Lok Po*, 336 U. S. 368, 69 S. Ct. 606, 93 L. Ed. — (1949);

Chicago v. *Fieldcrest Dairies*, 316 U. S. 163, — S. Ct. —, — L. Ed. — (1942);

A. F. L. v. *Watson* 327, U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946);

Township of Hillsborough v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 53, 90 L. Ed. 415 (1945).

where the Federal question may not survive the decision of the State court as to the local law. But defendants cite no ambiguous, novel or undecided State law involved herein. The authority of the Commission to issue the order is not questioned. The statute under which it acted is not attacked. The Alabama law requires no definitive construction of authoritative interpretation. *Alabama Public Service Commission v. Atlantic Coast Line R. Co., supra.* We hold that the doctrine of discretionary abstention does not apply.

[fol. 70] III. Maintaining that the allegations of the complaint afford no basis for injunctive relief in any event, defendants advert to the negative form of the Commission's order and assert that the effect of an injunction would be to interfere with enforcement of State criminal statutes contrary to time-honored principles of equity.

It is conceded that the order is negative in form,[6] but its legal effect could hardly be more positive. Viewed against the statutory scheme adopted by the State to regulate transportation companies, such order is conclusive evidence that plaintiff has done all it could under the State law to get relief and could not get it. To save itself from irreparable damage it must violate the State's criminal law and submit to its sanctions if State officers do their duty. This, equity does not require. Stripped of artificiality, the order amounts to a stark command by the State that plaintiff continue to furnish the train services involved or suffer the consequences of their abandonment. In view of the findings of fact and conclusions of law, *infra*,[7] we hold that in its impact on plaintiff's business it is affirmative in nature, having the practical effect of confiscating plaintiff's

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[6] The report and order of the Commission, after a statement of the case and a finding adverse to the railroad concludes: "Premises considered, It Is Ordered By The Commission, that the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of passenger trains No. 7 and 8, between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and it is hereby denied."

[7] See Findings of Fact Nos. 15-38 and Conclusions of Law Nos. 11-17, *infra*.

property in violation of the Fourteenth Amendment, and that it is clearly not within the rule of the cases relied upon by defendants.[8]

Equally tenuous is defendant's contention that the injunction prayed for would restrain enforcement of the criminal [fol. 71] laws of Alabama in an unwarranted manner. To impart reality to the protection afforded plaintiff by the Fourteenth Amendment it is essential that this court restrain defendants from seeking to impose the sanctions of fines, penalties and forfeitures provided in Title 48, Code of Alabama, 1940. We are without jurisdiction to grant the relief which the Commission wrongfully withheld, namely, permission for plaintiff to abandon these train services. We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance. Thus, it is not the threat of a multiplicity of prosecutions, but the finding of irreparable damage to plaintiff's property rights that is real, not fanciful, immediate, not remote, which moves us to grant an injunction. We know of no other manner of affording the relief to which plaintiff is entitled.

Defendants rely heavily upon the following statement in *Beal, County Attorney of Douglas County, Nebraska, et al. v. Mo. Pac. R. Co.*, 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941);

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. In re Sawyer, 124 U. S. 200, 211; Davis & Farnum Mfg. Co. v. Los Angeles, 189, U. S. 207; Hygrade Provisions Co. v. Sherman, 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for

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[8] *Standard Oil* v. *United States*, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931);
Piedmont & No. Ry. Co. v. *United States*, 280 U. S. 469, 50, S. Ct. 192, 74 L. Ed. 551 (1930).

relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. Terrace v. Thompson, 263, U. S. 197, 214; Packard v. Banton, 264, U. S. 140, 143; Tyson v. Banton, 273 U. S. 418, 428; Cline v. Frink Dairy Co., 274 U. S. 445, 452."

But it was also said in the Beal case, *Supra*:

"* * * that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint."

In the case at bar there was no concession or waiver of any claim of irreparable injury resulting from a multiplicity of suits or the deprivation of property without due process of law.

We hold that this case falls within the exception to the general rule and find apposite the following language in [fol. 72] *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927):

"* * * The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. Fenner v. Boykin, 271, U. S. 240, 243; Packard v. Banton, 264, U. S. 140; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502: Terrace v. Thompson, 263 U. S. 197, 214; Ex Parte Young, 209 U. S. 123; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Dobbins v. Los Angeles, 195 U. S. 223, 236, 241; In re Sawyer, 124 U. S. 200, 209, 211."

Proceeding to the merits of the case, we hold that plaintiff is entitled to the relief for which it prays and enter the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points within the State of Alabama on the one hand and points in other states throughout the South on the other hand, and is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

2. The defendant, Alabama Public Service Commission, consisting of a president and two associate commissioners; is an administrative body created under the laws of the State of Alabama (Title 48, Section 1, Code of Alabama, 1940), and thereby authorized to exercise certain regulatory powers over plaintiff (Title 48, Section 106, Code of Alabama, 1940). The principal office and official domicile of said Commission is located in the City of Montgomery, being within the Northern Division of the Middle judicial district of the State of Alabama. (Title 48, Section 106, Code of Alabama, 1940.) Defendant Persons is President, and defendants Hitchcock and Owen are Associate Commissioners of said Commission and are citizens of the State of Alabama and residents of the City of Montgomery.

3. The defendant Carmichael is Attorney General for the State of Alabama, and is a citizen of the State of Alabama and resident of the City of Montgomery. Defendant Carmichael, as Attorney General of the State of Alabama, [fol. 73] is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama and is attorney for defendant, Alabama Public Service Commission.

4. This is a suit of a civil nature between citizens of different states and arises under the Fourteenth Amendment to the Constitution of the United States. The matter in controversy, exclusive of interest and cost, exceeds the sum of $3,000.

5. Plaintiff complied with Title 48, Section 35 and Section 106, Code of Alabama, 1940, on the 13th day of September, 1948, by filing with defendant Commission an application for authority to discontinue the operation of two local intrastate passenger trains being operated daily between Tuscumbia, Alabama, and Chattanooga, Tennessee.

6. The defendant Commission set said application down for hearing at Huntsville, Alabama, for June 2, 1949. The hearing was continued by the Commission until August 4, 1949, and again until October 6, 1949, when it was heard by two representative of the Commission, none of the defendant commissioners being present thereat.

7. On April 3, 1950, the Commission entered its report and order and denied plaintiff's application.

8. Plaintiff seeks a temporary and permanent injunction against the defendants, separately and severally, from proceeding to enforce sanctions provided under the law of the State of Alabama for the failure or refusal of plaintiff to continue the operation of local passenger trains Nos. 7 and 8 within the State of Alabama in violation of order No. 11988, entered by defendant Commission April 3, 1950, and that said order be declared unlawful, null, void and of no effect.

9. On September 13, 1948, a notice was posted at each affected station in Alabama that plaintiff had petitioned the Alabama Public Service Commission for authority to discontinue local trains Nos. 7 and 8. These notices remained posted for a period of ten days in compliance with the rule of defendant Commission.

10. Local train No. 7 leaves Chattanooga, Tennessee, and makes scheduled or flag stops at the following towns in [fol. 74] Alabama: Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro, Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton, and Sheffield-Tuscumbia. Local train No. 8 makes the same trip in reverse, starting at Sheffield-Tuscumbia and ending at Chattanooga, Tennessee.

11. Train No. 7 leaves Chattanooga, Tennessee, at 4:15 P. M. and arrives at Sheffield-Tuscumbia, Alabama 9:05 p. m. Train No. 8 leaves Sheffield-Tuscumbia, Alabama, at 5:55 a. m. and arrives at Chattanooga, Tennessee, at 10:50 a. m.

12. In addition to local trains Nos. 7 and 8, plaintiff operates trains Nos. 35 and 36, and trains Nos 45 and 46 between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama. Train No. 35 leaves Chattanooga, Tennessee, at 7:00 A. M. and arrives at Sheffield-Tuscumbia, Alabama, at 12:20 p. m. Train No. 36 leaves Sheffield-Tuscumbia, Alabama, at 12:40

p. m. and arrives at Chattanooga, Tennessee, at 6:00 p. m. Train No. 45 leaves Chattanooga, Tennessee, at 11:50 p. m. and arrives at Sheffield-Tuscumbia, Alabama, at 4:10 a. m. Train No. 46 leaves Sheffield-Tuscumbia, Alabama, at 11:10 p. m. and arrives at Chattanooga, Tennessee, at 3:10 a. m. Trains Nos. 35 and 36 make a scheduled stop or flag stop at the following towns in Alabama:

Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro, Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton to Sheffield-Tuscumbia. Trains Nos. 45 and 46 make a scheduled stop or flag stop at Chattanooga, Tennessee, and the following towns in Alabama: Stevenson, Scottsboro, Huntsville, Decatur and Sheffield-Tuscumbia.

13. Odd number trains 7, 35 and 45 operate westbound from Chattanooga, Tennessee, to Sheffield-Tuscumbia, Alabama. Even number trains 8, 36 and 46 operate eastbound from Sheffield-Tuscumbia, Alabama, to Chattanooga, Tennessee. All six trains are operated daily and carry passengers, mail and express.

14. The passenger coaches used on trains Nos. 7 and 8 are of steel construction, electric lighted, steam heated, equipped with electric fans, flush toilets, window screens, drinking fountains and smoking compartment. The equipment is generally cleaned at Sheffield and Chattanooga, and repaired at Chattanooga.

[fol. 75] 15. It requires ten men to operate trains Nos. 7 and 8, five men in each direction. Each crew is composed of an engine crew of engineer and fireman and a train crew of conductor, flagman and baggageman. On Saturday and Sunday a porter is employed as an extra member on each train.

16. The few passengers that ride local trains Nos. 7 and 8 make a short-haul from one local town to another of about 5½ to 10 miles distance.

17. If trains Nos. 7 and 8 are discontinued, no station between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama, would be closed for that reason.

18. Statistical information concerning the operation of trains Nos. 7 and 8 for the twelve months ending February 29, 1948, shows that "actual" direct expenses ($87,524.05) very nearly approximate total gross revenue earned ($98,-

842.92). With "apportioned" direct expenses added, the twelve-months' operation resulted in an excess of direct expenses over total revenue of $78,710.74. Stated differently, the railway spend $1.80 to earn $1.00 of gross revenue.[9]

19. For the twelve-month period ending February 28, 1949, "actual" direct expenses ($90,993.77) exceeded total gross revenue ($79,956.27). With "apportioned" direct expenses added, direct expenses exceed total revenue by $102,326.93. Stated differently, the Railway paid out $2.28 to earn $1.00 of gross revenue.

20. For the five-month period ending July 31, 1949, "actual" direct expenses ($40,819.57) exceeded total gross revenue ($30,745.28). With "apportioned" direct expenses added, direct expenses exceeded total revenue by $53,692.56. The plaintiff railroad paid out $2.75 to earn $1.00 of gross revenue.

[fol. 76] 21. The average number of passengers on trains Nos. 7 and 8 per train mile decreased from 26.63 for the twelve months ending February 29, 1948, to 18.13 for the twelve months ending February 28, 1949, and to 13.92 for the five months ending July 31, 1949. The average number of passengers per train mile on all other Southern Railway passenger trains was 84.65 for the twelve months ending February 29, 1948, 76.30 for the twelve months ending February 28, 1949, and 67.93 for the five months ending July 31, 1949.

22. The average revenue from passengers per train mile for trains Nos. 7 and 8 decreased from 54.90 cents for the twelve months ending February 29, 1948, to 37.35 cents for

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[9] In these and the following computation the term "actual" direct expenses includes the wages for the train and engine crews, payroll tax, railroad retirement and unemployment insurance, train fuel and damage to livestock on the right of way. The term "apportioned" direct expenses includes engine house expenses, water, lubricants, supplied and repairs for passenger locomotives and train cars, costs of trackage over N. C. & S. L., and the Chattanooga station company expenses. Nothing was included for maintenance of way, track and structures, station, yard, all traffic expenses, general supervision, taxes except payroll, fixed charges, depreciation or return on investment.

the twelve months ending February 28, 1949, and to 29.22 cents for the five months ending July 31, 1949; this contrasts with all other Southern Railway passenger trains, with an average of 192.81 cents for the twelve months ending February 29, 1948, 195.92 cents for the twelve months ending February 28, 1949, and 183.67 cents for the five months ending July 31, 1949.

23. Plaintiff's operation of its entire passenger business for the period 1931-1941, inclusive, resulted in a net operating deficit of $55,262,779. For the period 1942-1945, inclusive, passenger operations produced a net operating income of $44,938.879. For the post-war years, 1946-1948, inclusive, passenger operations resulted in a net operating deficit of $20,796,189. However, for the same respective periods, plaintiff's net freight service operating income was as follows: for the years 1931-1941, inclusive, $233,815,273; for the years 1942-1945, inclusive, $97,305,303; for the years 1946-1948, inclusive, $90,631,088. By combining the results of passenger and freight service, it appears that plaintiff's net operating income was as follows: for the years 1931-1941, inclusive, $178,552,494; for the years 1942-1945, inclusive, $142,244,182; and for the years 1946-1948, inclusive, $69,834,899.

24. For each year 1936-1941, inclusive, plaintiff's operation of passenger service within the State of Alabama resulted in a net operating deficit, the total for such period having been $3,962,525. For each year 1942-1945, inclusive, there was a net operating income, the total for such period having been $2,946,758. For each year 1946-1948, inclusive, there was a net operating deficit, the total for such period having been $2,872,505. The plaintiff's operation of freight [fol. 77] service within the State of Alabama resulted in the following: for the years 1936-1941, inclusive, a net operating income of $13,012,218; for the years 1942-1945, inclusive, a net operating income of $13,934,056; and, for the years 1946-1948, inclusive, a net operating income of $10,667,882. Taking these two sets of figures together, the plaintiff's operation within the State of Alabama resulted in a net railway operating income from both passenger and freight service for the years 1936-1941, inclusive, of $9,049,693; for the years 1942-1945, inclusive, of $16,880,814, and for the years 1946-1948, inclusive, of $7,795,377.

25. Comparing 1948 with 1936, plaintiff's average receipts per passenger mile throughout its entire system increased

47%, whereas the average annual compensation per employee increased 109%, materials and supplies 134% and payroll taxes 1,344%.

26. For the Southern Railway Company as a whole, the average yearly gross revenue from passengers was: for the years 1921-1930, inclusive, $27,956,720; for the years 1931-1941, inclusive, $9,573,645; for the years 1942-1945, inclusive, $52,639,553; and for the years 1946-1948, inclusive, $25,195,733.

27. A comparison of the distribution of inter-city passenger traffic in the United States for the years 1926 and 1948 shows that in 1926 the steam roads handled 21.9%, in 1948 only 11.4%, a decrease of 48%. Private automobiles in 1926 transported 70.9%; in 1948, 79.7%, an increase of 12%. Busses transported 2.7% in 1926 and 6.6% in 1948, an increase of 144%.

28. For the year ending February 29, 1948, the daily average revenue from passengers on trains Nos. 7 and 8 was $180.94, whereas the daily average total of wages, payroll tax and fuel was $238.04. For the year ending February 28, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $124.74, whereas the daily average total of wages, payroll tax and fuel was $276.19. For the five-month period, March 1, through July 31, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $97.02, whereas the daily average total of wages, payroll tax and [fol. 78] fuel was $265.26. For the eight-month period, August 1, 1949, through March 31, 1950, the daily average revenue from passengers on trains Nos. 7 and 8 was $83.11, whereas the daily average total of wages, payroll tax and fuel was $278.57.

29. Prior to 1946, plaintiff operated a diesel-electric power unit, the "Joe Wheeler," on the run now served by trains Nos. 7 and 8, but after several years of experimentation, discontinued its operation because of the uneconomical results which obtained.

30. Plaintiff is not a common carrier of the United States mail. The collection and delivery of all mail is the function of the United States Government, exclusively.

31. The line of railroad traversed by trains Nos. 7 and 8 from Bridgeport, Alabama, to Sheffield-Tuscumbia, Alabama, is closely paralleled by hard surface highways and many of the communities along the railroad are located directly on important east-west highways. Several of the

larger communities are also located on important north-south highways. The Lee Highway (U. S. No. 72) closely parallels the line of railroad from the Alabama-Tennessee state line to Huntsville, from which point the railroad runs southwesterly to Decatur, and then generally westerly to Tuscumbia. From Huntsville to Tuscumbia the line of railroad is closely paralleled by the Joe Wheeler Highway (Ala. No. 20).

32. The American Bus Lines operates thirteen round trips daily between Florence and Huntsville. Seven of these schedules operate easterly over State Highway No. 20 between Tuscumbia and Huntsville, while six schedules operate westerly from Huntsville to Tuscumbia, via State Highway No. 20. The remaining schedules, east and west, operate over U. S. Highway No. 72 via Athens. Some of these busses operate in through service between Memphis and Charlotte and Memphis and Asheville. Eight round trips are operated daily between Florence and Chattanooga. Not less than seventy busses arrive in or depart from Huntsville daily. Decatur is also served by the Southeastern Greyhound Lines, operating nine round trips daily between Nashville and Birmingham.

[fol. 79] 33. The stops, in timetable order, populations and bus service available for each of the towns traversed by trains Nos. 7 and 8 between Stevenson and Sheffield-Tuscumbia are as follows:

(a) Bridgeport, an agency station (NC&StL) in an incorporated community with a population according to the 1940 federal census of 2031 (2124 in 1930):

Located on U. S. Highway No. 72.

Six busses daily between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of Southern Railway Company.

(b) Stevenson, an agency station in an incorporated community with a population according to the 1940 federal census of 793 (783 in 1930):

Located on U. S. Highway No. 72.

Six busses daily between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of the Southern Railway Co.

(c) Fackler, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on gravel road about two miles from U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

Bus service along U. S. Highway No, 72.

(d) Hollywood, an agency station in an incorporated community with a population according to the 1940 federal census of 311 (274 in 1930):

Located on gravel road about one mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

(e) Scottsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 2834 (2304 in 1930):

Located at junction of U. S. Highway No. 72 and State Primary Highways Nos. 32 and 35.

Eight busses daily in each direction between Florence and Huntsville and Chattanooga via American Bus Lines.

One bus daily in each direction between Scottsboro and Chattanooga via American Bus Lines.

Two round trips daily between Scottsboro and Flat Rock via Northeast Alabama Bus Co., Inc.

Four round trips daily between Ft. Payne and Guntersville via Northeast Alabama Bus Co., Inc.

Also served by other daily trains of Southern Railway Co.

(f) Larkinsville, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on U. S. Highway No. 72.
Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.
Also served by other daily trains of Southern Railway Co.

[fol. 80] (g) Limrock, a non-agency station in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Located on U. S. Highway No. 72.
Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.
Also served by other daily trains of Southern Railway Co.

(h) Woodville, an agency station in an incorporated community with a population according to the 1940 federal census of 183 (196 in 1930):

Located on U. S. Highway No. 72.
Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.
Also flag stop for Southern Railway daily trains 35 and 36.

(i) Paint Rock, an agency station in an incorporated community with a population according to the 1940 federal census of 282 (320 in 1930):

Located on U. S. Highway No. 72.
Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.
Also served by daily Southern Railway trains 35 and 36.

(j) Gurley, an agency station in an unincorporated community with an estimated population of 500 within sight of the station:

Located on U. S. Highway No. 72.
Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(k) Brownsboro, an agency station in an unincorporated community with an estimated population of 75 within sight of the stopping place:

Located on hard surface road about six-tenths of a mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also flag stop for daily Southern Railway trains 35 and 36.

(l) Chase, a joint agency station (with NC&StL) in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Flag stop for train No. 7 and regular stop for train No. 8.

Located on hard surface road about two miles from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72 (Chase Road) between Florence and Chattanooga. Also bus service along unnumbered road between Huntsville and Shelbyville, Tenn. via Cherokee Motor Coach Lines.

Also served by daily except Sunday, mixed trains of the NC&StL, operating between Decherd, Tenn. and Huntsville, about 48 miles.

Also flag stop for daily Southern Railway trains 35 and 36.

(m) Huntsville, an agency station in an incorporated community with a population according to the 1940 federal census of 13,050 (11,554 in 1930):

Located at junction of U. S. Highways Nos. 24, 72 and 241 and State Primary Highway No. 20.

Eight busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Thirteen busses daily in each direction between Florence and Huntsville (seven via Tuscumbia eastbound and six via Tuscumbia westbound—the remaining schedules via Athens) via American Bus Lines.

[fol. 81]

Five busses daily in each direction from and to New Market (four each way from and to Winchester, Tenn.) via Cherokee Motor Coach Lines.

Nine busses daily to and from Nashville, Tenn. via Crescent Stages, Inc.

Eight busses daily to and from Montgomery, Ala., via Crescent Stages, Inc.

Eleven busses daily to and from Anniston, Alabama, via Crescent Stages, Inc.

Nine busses daily to and from Sylacauga, Ala. (with connections to and from Birmingham) via Crescent Stages, Inc.

Also served by other daily trains of Southern Railway Co.

Also served by daily, except Sunday, mixed trains of NC&StL between Decherd, Tenn. and Huntsville, about 48 miles.

(n) Madison, an agency station in an incorporated community with a population according to the 1940 federal census of 455 (431 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Decatur and Huntsville and six busses daily between Huntsville-Decatur and Florence via American Bus Lines.

Connection at Huntsville from and to Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(o) Belle Mina, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville via Decatur and six busses daily between Huntsville and Tuscumbia-Florence via Decatur via American Bus Lines.

Also flag stop for daily Southern Railway trains 35 and 36.

(p) Decatur, an agency station in an incorporated community with a population according to the 1940 federal census of 16,604 (15,593 in 1930):

Located at junction of U. S. Highway No. 31 and State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines. Connections at Huntsville from and to Chattanooga.

Three busses daily in each direction to and from Red Bay, Ala., via Red Bay Bus Lines.

Four busses daily in each direction from and to Moulton, Ala., via Red Bay Bus Lines.

Nine busses daily in each direction between Birmingham and Nashville via Southeastern Greyhound Lines.

Also served by other daily Southern Railway trains in addition to daily L & N trains between Cincinnati-Birmingham and beyond.

(q) Trinity, a non-agency stop in an incorporated community with a population according to the 1940 federal census of 249 (208 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Florence and Huntsville with connections at Huntsville to and from Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

[fol. 82] (r) Hillsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 292 (240 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Florence and Huntsville with connection at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(s) Wheeler, a non-agency station with an estimated population of 100 within sight of the station:

Located on State Highway No. 20.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and

Florence via American Bus Lines with connections at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(t) Courtland, an agency station in an incorporated community with a population according to the 1940 federal census of 454 (359 in 1930):

Located on State Highway No. 20 near junction with State Highway No. 36, the latter highway connecting State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(u) Town Creek, an agency station in an incorporated community with a population according to the 1940 federal census of 637 (427 in 1930):

Located at junction of State Highway No. 20 and State Highway No. 101, the latter highway connecting State Highway No. 20 and U. S. Highway No. 72.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and Florence via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(v) Leighton, an agency station in an incorporated community with a population according to the 1940 federal census of 810 (670 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville and Tuscumbia-Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

34. The motor vehicle registration in the State of Alabama for the year 1948 shows 391,704 automobiles, 3,859 busses and 137,511 trucks.

35. The number of inhabitants per registered automobile in the counties of Alabama through which trains Nos. 7 and 8 run are as follows: Colbert, 6.2; Lawrence, 11; Limestone, 8.8; Morgan, 7.5; Madison, 7.4; Jackson, 12.9; and, for the State of Alabama, the number of inhabitants per registered automobile is 7.8.

[fol. 83] 36. There is adequate highway motor freight service along the route traversed by trains Nos. 7 and 8, and each city or town is serviced by one or more of the following interstate highway motor freight carriers:

Baggett Transportation Co.
Birmingham-Huntsville Transport, Inc.
Fayetteville Transfer Co.
Loo-Mac Freight Lines
Malone Freight Lines, Inc.
Martin Motor Express
Neely-Ross Motor Express, Inc.
North Alabama Motor Express, Inc.
Roadway Express, Inc.
Silver Fleet Motor Express, The
Valley Truck Lines, Inc.
Mohawk Motor Lines, Inc.
Dixie-Ohio Express Co.
Gordon's Transports, Inc.
Hoover Motor Express Co., Inc.
McCullough & Sanderson
Inter-City Trucking Co.
Meeks Motor Freight

37. The passenger transportation revolution, resulting from the construction of a vast network of highways, improvement of the private automobile, and the availability of bus service, has transferred passenger transportation needs from the railroad to the highway.

38. The convenience of the private automobile and busses has outmoded local passenger trains Nos. 7 and 8 and caused them to become an undesirable form of transportation.

Conclusions of Law

1. Plaintiff's suit arises under the Fourteenth Amendment to the United States Constitution and the matter in

controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. This court has jurisdiction of the parties and of the subject matter.

3. The questions for decision present no unresolved question of State law.

4. Under the provisions of Title 48, Sections 35 and 106, Code of Alabama, 1940, plaintiff is required to obtain a permit from Alabama Public Service Commission before discontinuing regularly scheduled passenger trains.

[fol. 84] 5. Defendants Persons, Hitchcock, and Owen, as the President and Associate Commissioners of the Alabama Public Service Commission, are charged with the duty of regulating and controlling transportation companies (Title 48, Section 104, et seq., Code of Alabama, 1940).

6. Defendant Carmichael, as Attorney General of the State of Alabama, is charged with the duty of enforcing all orders of the Alabama Public Service Commission and the sanctions provided in Title 48, Code of Alabama, 1940.

7. The Alabama Public Service Commission is charged with the duty of supervising, regulating and controlling all transportation companies doing business in the State in specified particulars, including the maintenance of such public service as may be reasonable and just. Title 48, Section 104, Code of Alabama, 1940.

8. In Alabama the duty to maintain such public service as may be reasonable and just is not imperative but is relative. "In order to justify a reduction of the service, the carrier is not required to show that the rate of return on the system requires the reduction, or that it would impede interstate commerce, but it is sufficient if the reduced plan would supply such train service as the public necessities demand and require (cases cited.)" *Ala. Pub. Serv. Comm.* v. *Atlantic Coast Line R. Co.*, — Ala. —, 45 So. 2d 449 (1950).

9. Plaintiff is under no obligation to continue to offer a service which the public will not use, where the offer is a financial burden, and where it is unreasonable to demand its continuance.

Thompson v. *Boston & Maine R. R.*, 86 N. H. 204, 166 A. 249;

Atlantic Coast Line R. R. v. *Public Service Comm. of So. Carolina, supra;*

Alabama Public Service Comm. v. *Atlantic Coast Line R. Co., supra.*

10. The controlling criteria in determining whether local passenger trains may be discontinued are these: the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole.

Atlantic Coast Line R. R. v. *Public Service Comm. of So. Carolina, supra;*

Ala. Pub. Ser. Comm. v, *Atlantic Coast Line R. R., supra.*

[fol. 85] 11. If plaintiff continues to operate local trains Nos. 7 and 8, it will suffer irreparable damage by expending sums grossly disproportionate to revenue in a situation where there is no pubilc necessity or demand for such service.

12. If plaintiff fails to operate local trains Nos. 7and 8, plaintiff will be subjected to irreparable loss by incurring liability under sanctions imposed by Title 48, Code of Alabama, 1940, including Sections 110, 399, 400 and 405.

13. Plaintiff has no adequate remedy at law.

14. Plaintiff will suffer irreparable damage unless this court permanently enjoins defendants and their successors in office from seeking to impose the sanctions provided by Title 48, Code of Alabama, 1940, upon discontinuance by plaintiff of operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in opposition to the order of the defendant Commission, Docket No. 11988, April 3, 1950.

15. Order No. 11988, of April 3, 1950, rendered by the defendant Commission denying plaintiff permission to discontinue local trains Nos. 7 and 8 is unjust, unreasonable and confiscatory and deprives plaintiff of its property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States since there is no longer public necessity for this service and plaintiff is operating at a large financial loss.

16. Plaintiff owes no common carrier obligation, either to the United States or to the General Public to transport the United States Mail.

17. Plaintiff is entitled to a permanent injunction enjoining defendants Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. Owen, Associate Commissioners, and A. A. Carmichael,

Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys from pursuing any of the remedies of mandamus, injunction, fine, forfeiture or penalty provided in Title 48, Sections 110, 399, 400 and 405, Code of Alabama, 1940, or otherwise, for the purpose of compelling [fol. 86] plaintiff to continue to operate local trains Nos. 7 and 8 between Sheffield-Tuscumbia, Alabama, and Chattanooga, Tennessee, pursuant to Title 48, Sections 35 and 106, Code of Alabama, 1940, and the order of the Alabama Public Service Commission, Docket No. 11988, of April 3, 1950.

Done at Montgomery, Alabama, this the 20 day of July, 1950.

Leon McCord, United States Circuit Judge; C. B. Kennamer, United States District Judge; Seybourn H. Lynne, United States District Judge.

[File endorsement omitted.]

[fol. 87] In the United States District Court for the Middle District of Alabama, Northern Division

Civil Action. No. 681

Southern Railway Company, a Corporation, Plaintiff,

vs.

Alabama Public Service Commission, Gordon Persons, Its President and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, Defendants

Decree—Filed July 20, 1950

This cause coming on to be heard before a duly constituted three-judge district court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant, Alabama Public Service Commission, held at Huntsville, Alabama, on October 6, 1949, for

the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein:

It is now Ordered, Adjudged and Decreed this 20th day of July 1950, as follows, viz:

(1) That the motion of the defendants to dismiss and the several motions of the defendants to stay proceedings in this cause be and the same are hereby denied;

(2) That the order of the defendant, Alabama Public Service Commission, dated April 3, 1950, denying the petition of plaintiff filed September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and the same is hereby vacated and declared to be null, void and of no effect;

[fols. 88-94] (3) That the defendants, Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys, be and they are hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing the operation of plaintiff's passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated within the State of Alabama; and,

(4) That the costs of court incurred in this cause be and the same are hereby taxed against the defendants, for which execution may issue.

Leon McCord, United States Circuit Judge; C. B. Kennamer, United States District Judge; Seybourn H. Lynne, United States District Judge.

[File endorsement omitted.]

[fol. 95] Cost Bond on Appeal for $500.00 approved and filed Sept. 18, 1950, omitted in printing.

[fol. 96] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE—Filed October 5, 1950

To the Clerk of the Above Named Court:

You will please prepare a transcript of the record in the above entitled cause to be transmitted to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. The original bill of complaint, and the exhibits thereto, filed May 3, 1950.
2. The summons to answer said bill of complaint, dated May 3, 1950.
3. The designation of the three judges to serve on the District Court of three judges, filed May 8, 1950.
4. The order requiring that defendants answer by May 17, 1950, dated May 8, 1950.
5. The motion addressed to Honorable Charles B. Kennamer, District Judge, Middle District of Alabama, moving for stay of the call of a three-judge District Court, filed May 15, 1950.
6. The motion to dismiss the action, filed May 17, 1950.
7. The defendants' answer to complaint and all exhibits thereto, filed May 17, 1950.
8. The motion to stay any further actions, orders, or decrees filed May 17, 1950.
9. The opinion of the District Court, including the Findings of Fact, Conclusions of Law and opinion dated July 20, 1950.
10. The final judgment or decree made and entered on July 20, 1950.

[fol. 97] 11. Petition for Appeal filed September 8, 1950.
12. Order allowing appeal made and entered September 18, 1950.
13. Citation on appeal made and entered September 18, 1950.
14. Assignment of Errors filed September 18, 1950.
15. Statement of Jurisdiction of Supreme Court of the United States.
16. Statement required by Rule 12, Sec. 2 of Rules of

Supreme Court of United States with acceptance of service of notice of appeal.

17. This praecipe.

October 4, 1950.

A. A. Carmichael, Attorney General of Alabama; Wallace L. Johnson, Assistant Attorney General of Alabama; Richard T. Rives, of Counsel for Appellants; John C. Godbold, of Counsel for Apellants.

Service accepted this the 4th day of October, 1950.

Marion Rushton, of Counsel for Appellee.

[File endorsement omitted.]

[fol. 98] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 99] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed November 10, 1950

I

Pursuant to Rule 13, paragraph 9, of this Court, apellants adopt for their statement of points upon which they intend to rely in their appeal to this Honorable Court the points contained in their assignment of errors heretofore filed.

II

Appellants designate the entire record as filed in the above styled cause, for printing by the Clerk of this Honorable Court.

A. A. Carmichael, Attorney General of Alabama; Wallace L. Johnson, Assistant Attorney General of Alabama; Richard T. Rives, of Counsel for Appellants; John C. Godbold, of Counsel for Appellants.

Service accepted of the above statement and designation this the 9th day of November, 1950.

Marion Rushton, of Counsel for Appellee.

[fol. 99a] [File endorsement omitted.]

[fol. 100] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 395

ORDER NOTING PROBABLE JURISDICTION—November 27, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the summary docket and assigned for argument immediately following No. 146, which case is also transferred to the summary docket.

November 27, 1950.

Endorsed on Cover: File No. 54, 901 U. S. D. C. Middle Alabama, Term No. 395. Alabama Public Service Commission, et al., Appellants, vs. Southern Railway Company. Filed October 31, 1950. Term No. 395 O. T. 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION; GORDON PERSONS, ITS PRESIDENT, AND JIMMY HITCHCOCK AND C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, AND A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Appellants,

vs.

SOUTHERN RAILWAY COMPANY, A CORPORATION,

Appellee.

MOTION

Come the appellants in the above styled cause and show nto the Court that heretofore an appeal has been taken o this Honorable Court in the case of Alabama Public Service Commission, Gordon Persons, its President, and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, appellants, vs. Southern Railway Company, a corporation, appellee, which appeal was docketed as Case No. 146, October Term 1950, and of which appeal

probable jurisdiction was noted by the Court on, to-wit, October 9, 1950;

That the parties in case No. 146 and this cause are the same and the questions of law involved in the two appeals are the same or closely similar;

That both cases involve questions of injunctions issued by specially convened three-Judge Federal District Courts convened under authority of United States Code, Title 28, Section 2281, in cases arising out of the orders of the Alabama Public Service Commission relating to applications by Southern Railway Company, the appellee in each case, to discontinue certain local train service in the State of Alabama.

Wherefore, appellants move that this case No. 395, and the earlier case No. 146, be heard together at the time set for hearing of this case No. 395.

Respectfully submitted,

A. A. CARMICHAEL,
Attorney General of Alabama.

WALLACE L. JOHNSON,
Assistant Attorney General of Alabama.

RICHARD T. RIVES,
of Counsel for Appellants.

JOHN C. GODBOLD,
of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

STATEMENT AS TO JURISDICTION

A. A. CARMICHAEL,
Attorney General of Alabama,
WALLACE L. JOHNSON,
Assistant Attorney General of Alabama,
RICHARD T. RIVES,
JOHN C. GODBOLD,
Counsel for Appellants.

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Table of Cases Cited

STATUTES CITED

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA,
NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, A CORPORATION,
Plaintiff,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, AS ITS PRESIDENT, and JIMMY HITCHCOCK and C. C. (JACK) OWEN, ASSOCIATE COMMISSIONERS, and A. A. CARMICHAEL, ATTORNEY GENERAL OF THE STATE OF ALABAMA,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, defendants-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Middle District of Alabama, Northern Division, is not reported. A copy of the opinion, findings of fact, conclusions of judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the District Court was entered on July 20, 1950. A petition for appeal is presented to the District Court herewith, to-wit, on September 18th, 1950. The appeal herein is from the final decree made and entered by the District Court of the United States specially constituted under Title 28, Sections 2281 and 2284, United States Code, and, as provided in Section 1253, Title 28, United States Code, a direct appeal to the Supreme Court of the United States may be taken from the final decree made by such specially consfituted District Court. It is further provided by Title 28, Section 2101 (b) that such a direct appeal to the Supreme Court of the United States from such a final decree may be taken within sixty days.

Questions Presented

Where state statutes provide that a railway may not abandon service unless it first obtains a certificate from the State Public Service Commission allowing such abandonment, and after hearing and consideration the Commission declines to grant such cer ificate and the railway files a complaint asking an injunction of a three-judge Federal Court:

a. Does a three-judge Federal Court have jurisdiction of such suit if the railway has made no attack on the constitutionality of the statutes which require that the trains continue operation, but only on the constitutionality of the order which denied the certificate to abandon?

b. Does a three-judge Federal Court have jurisdiction of such suit if only the constitutionality of the order is attacked, but relief sought is an injunction enjoining the Public Service Commission and other state officers from enforcing any penalties or remedies provided under state law, which penalties or remedies are not called for by the order or authorized by it?

c. Assuming *arguendo* that there is jurisdiction for a three-judge federal court, should the court abstain from exercising it to enjoin enforcement of state criminal laws where there has been no threat of imminent enforcement of criminal sanctions, no allegation of possible multiplicity of suits, and where any criminal penalties which might be assessed would be only a consequence of violation of the state law?

d. Assuming *arguendo* that there is a jurisdiction for a three-judge federal court, should the court abstain from exercising its jurisdiction in recognition of the wisdom of allowing state courts to try questions of local state policy relating to complicated questions of fact?

Statutes Involved

Code of Alabama 1940, Title 48, Sections 35, 50, 76, 78, 79, 81, 82, 84, 106, 399 and 400; United States Code, Title 28, Sections 1253, 2101 (b), 2281, 2284. The said statutes are set out verbatim or pertinent parts thereof are appropriately summarized in Appendix B hereto.

Statement

Appellee, hereinafter referred to as Southern, has operated trains between Sheffield-Tuscumbia, Alabama and Chattanooga, Tennessee, as a part of its railroad system. In September 1948 Southern petitioned the Alabama Public Service Commission to allow it to abandon the operation of passenger trains 7 and 8 between the above cities, pursuant to the requirements of Code of Alabama 1940, Title 48, Sections 35 and 106, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for permit to abandon service and obtained from the Commission a permit allowing such abandonment. After two continuances, a hearing was had on October 6, 1949, and on April 3, 1950, the Commission entered an order denying Southern's application for authority to abandon.

Southern did not ask for a re-hearing under Code of Alabama 1940, Title 48, Section 76, nor did it take an ap-

peal from the Commission's order, even though Code of Alabama 1940, Title 48, Section 79 provides for an appeal from any final action or order of the Public Service Commission to the Circuit Court of Montgomery County, Alabama, in Equity, and thence to the Supreme Court of Alabama. Sections 81 and 84 of Title 48 provide that on any such appeal the order or action appealed from may be stayed or superseded by the State Appellate Court, or the Judge thereof, upon hearing after consideration of the testimony taken before the Commission, and except in rate cases not here involved, such supersedeas may be ordered by the said Court or Judge without the requirement of a supersedeas bond. Section 82 of Title 48 provides that the Appellate Court shall hear the case upon the certified record and shall set aside the order of the commission if the Court finds that the Commission erred to the prejudice of appellant's substantial rights in its application of the law, or that the order was based upon a finding of facts contrary to the substantial weight of the evidence.

Instead Southern filed its complaint in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved, and upon diversity of citizenship, and asked for convocation of a district court of three judges and a hearing under the provisions of U. S. Code, Title 28, Section 2284. Southern alleged that the revenue received from operation of trains 7 and 8 was disproportionate to expenses and that the continuation of such trains was not required by public convenience and necessity. There were allegations that the Commission's order deprived Southern of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory. It was also averred that Southern had exhausted all administrative remedies available to it.

Paragraph IV of the complaint contained a purely colorable attack on the constitutionality of Code of Alabama 1940, Title 48, Sections 35 and 106, the railroad frankly stating that it was making such allegations for the purpose, and only for the purpose, of avoiding an admission of record that the statutes were unconstitutional and also stating "The plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama." At the trial, as in the pleadings, Southern's only real attack on constitutional grounds was directed at the Commission's order of April 3, 1950.

Appellants first filed with Hon. Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a petition directed to him individually, asking that he stay the call for a three-judge federal court. No formal order was issued by Judge Kennamer, but this motion was ruled upon by the three-judge Court after it convened, along with other motions. Thereafter appellants filed a motion to dismiss, a motion to stay and an answer. After oral argument on May 22, 1950, all of appellants' motions were overruled and it was then stipulated by counsel for the parties that evidence should be taken and the case submitted on Southern's prayer for a permanent injunction. Thereafter, on July 20, 1950, the Court issued its final judgment and decree overruling all of appellants' motions, declaring the Commission's order of April 3, 1950 to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys from taking any steps or proceedings of any nature whatsoever against the Southern to enforce the order of April 3, 1950, or to enforce any fine, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff, its officers, agents or

employees on account of the failure to observe the provisions and requirements of the order by abandoning and discontinuing the operation of plaintiff's passenger trains Nos. 7 and 8 from Tuscumbia, Alabama to Chattanooga, Tennessee, so far as they are operated in the State of Alabama.

The Questions Are Substantial

The questions involved in this appeal are similar to those raised in several recent cases before this Court, among them being:

Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941);

Burford v. *Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098 (1943)

Beal et al. v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418 (1941)

Ex parte Bransford, 310 U.S. 354, 60 S. Ct. 947 (1940)

There are involved the same fundamental issues of how far the federal judiciary has jurisdiction over local questions which can be adjudicated by state courts, and to what extent federal courts should exercise jurisdiction which they do have over such questions where there is ample provision for judicial determination within the framework of state courts. The decision of the three-judge District Court in finding that it had jurisdiction is in direct conflict with the language of the statute under which it was convened, and even had there been jurisdiction the decision is contrary to the clear policy set out in numerous recent decisions of the Supreme Court that federal courts will stay their hand on local matters until the state courts have ruled.

. . . . . .

I. As appellants read Tit. 28, U.S.C. Sect. 2281, three requirements must be met before there is jurisdiction for a special three-judge federal court.

a. An interlocutory or permanent injunction must be sought.

b. The injunction must be sought on the ground that a state statute is unconstitutional (*Oklahoma Natural Gas Co.* v. *Russell*, 281 U.S. 290, 43 S. Ct. 353 (1923) interprets "statute" as including "order".)

c. The injunction must seek restraint of enforcement, operation or execution of the statute or order whose constitutionality is attacked. Appellants submit that there can be real question of this in view of the specific language of the statute:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any state statute (including "order", since the *Oklahoma* case) . . . shall not be granted . . . upon the ground of the unconstitutionality of *such* statute (including "order" since the *Oklahoma* case)."

Southern's complaint failed to meet requirements "b" and "c" as to any Alabama statute. The attack on the constitutionality of Tit. 48, Secs. 35 and 106 is colorable and in fact Southern frankly stated it did not ask for an adjudication of constitutionality of the statutes because "that is a matter primarily for the Supreme Court of Alabama." The prayer for relief includes statutes in the requested cloak of protection, for it refers to "any penalties or other remedies provided under the laws of the State of Alabama," but the statutes included neither are identified nor is their constitutionality attacked.

As to the Commission's order of April 3, 1950, it is squarely charged to be unconstitutional, but the complaint did not ask relief in terms of the order but went far beyond that and sought an injunction against all possible

penalties and remedies under Alabama law, a much broader field of relief than the language of Section 2281 allows—injunction against "enforcement, operation or execution" of "such statute or such order". Southern's prayer and the Court's decree would include even common law remedies, which is a broad extension of Sec. 2281. And the Alabama Supreme Court has held that orders of the Commission may be enforced by the courts by issuance of writs of mandamus.

Alabama Public Service Commission v. *Western Union Telegraph Co.*, 208 Ala. 243, 94 So. 472 (1922).

Southern has sought to create a new field for federal jurisdiction by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute, and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the State.

The theory of the District Court seemed to be that it could enjoin whatever penalties and remedies, statutory or common law, as it saw fit in order to give effective relief as a duly convened court of equity. But this is "bootstrap law", since jurisdiction is conferred initially only if relief is sought from the statute (or order) whose constitutionality is questioned. The three-judge court cannot, by the broad scope of its relief confer jurisdiction upon itself retrospectively, if the complaint averred no case quickening the special jurisdiction of the statutory created court. The three-judge court is of statutory creation and its jurisdiction is to be strictly limited by the statute which created it, and is not to be lightly extended.

Okla. Gas & Elec. Co. v. *Okla. Packing Co.*, 292 U. S. 386, 54 S. Ct. 732 (1934);

Phillips v. *U. S.*, 312 U. S. 246, 61 S. Ct. 480 (1941).

Too, it is noteworthy that the extraordinary relief obtained, going far beyond the relief against "such statute" (N.B., or "order") authorized by Sec. 2281, is exactly the relief prayed for by the Southern from the very beginning, and the complaint was challenged by appellants on jurisdictional grounds before the three judges ever convened (by motion directed to Judge Charles B. Kennamer individually) and challenged again after the three-judge court convened but before any evidence was taken and before the Court ruled that it had jurisdiction to proceed. This is no special case of equity giving extraordinary relief where it cannot give that asked but of equity giving the relief prayed for.

The "negative order" doctrine of *Standard Oil Co.* v. *U. S.*, 283 U. S. 235, 51 S. Ct. 429 (1931) and *Piedmont & Northern Ry.* v. *U. S.*, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: *U. S.* v. *I. C. C.*, 337 U. S. 426, 69 S. Ct. 1410 (1949);
But cf.: *Ashland Coal & Ice Co.* v. *U. S.*, 325 U. S. 840, 65 S. Ct. 1573 (1945).

More than a negative order is involved here where the attack on the order is the nominal basis for three-judge jurisdiction on constitutional grounds, with relief being sought from a statute whose constitutionality is admittedly a matter for state court decision.

The District Court has also overlooked *Ex parte Bransford*, 310 U. S. 354, 60 S. Ct. 947 (1940), where a distinction is made between the ground of unconstitutionality of a statute as applied, which requires a three-judge Court, and the ground of the unconstitutionality of the result obtained by use of a statute which is not attacked as unconstitutional. Southern has done no more than attack as unconstitutional the result of an administrative act, and has not attacked the statute as generally applied to petitions

for discontinuance. This case also holds that a three-judge court is not required unless the action complained of is directly attributable to the statute (or an order, *a fortiori*). Here the penalties and remedies as to which relief is sought are not called for by the order or authorized by it, but in truth and in fact are directly attributable only to the statute.

The decision of the District Court is in conflict with the holding in *Wilentz et al.* v. *Sovereign Camp*, 306 U. S. 573, 59 S. Ct. 709 (1939) wherein it is held that an injunction in a three-judge case must be directed at state officers who are clothed with authority to enforce the challenged statute and have taken steps to enforce such statute. In view of *Oklahoma Natural Gas Company, supra*, this would apply to the Commission's order, but no state official has taken any steps to enforce the order, which in fact calls for no enforcement.

* * * * * * *

II. The decision below is in conflict with *Beal et al.* v. *Missouri Pacific R. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, (1941), which case indicates that if only a single suit is contemplated for penalties, the Supreme Court could not say that any such irreparable injury is threatened as would justify staying prosecution of the criminal laws of the State and withdrawing the determination of the legal question involved from the state courts whose appointed function it is to decide it. In the present case Southern has not alleged any possible multiplicity of suits nor has it adduced any evidence to that effect. In fact there has been no move on the part of any state officer to enforce the statute at all. The case also notes that even if an adverse decision were rendered in the state court causing large penalties to be

assessed against the railroad, such penalties might well be the consequence of violation of state law.

* * * * * * *

III. The decision below is contrary to numerous recent holdings of the Supreme Court concerning the desirability of federal courts abstaining from exercising their jurisdiction on matters which are properly decided first by the courts of the state.

Shipman v. *Dupre*, 339 U. S. 323 (1950);
Railroad Commission of Texas v. *Pullman Co.*, 312 U. S. 496, 61 S. Ct. 643 (1941);
Burford v. *Sun Oil Co.*, 319 U. S. 315, 63 S. Ct. 1098 (1943);
Chicago v. *Fieldcrest Dairies*, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. *Watson*, 327 U. S. 582, 66 S. Ct. 761 (1946);
Township of Hillsboro v. *Cromwell*, 326 U. S. 620, 66 S. Ct. 445 (1945);
Stainback v. *Mo Hock Ke Lok*, 336 U. S. 368, 69 S. Ct. 606 (1949).

The same thread runs through all of the above cases, that to avoid needless friction with state policies the federal judiciary should exercise a wise discretion giving due regard to the rightful independence of the state government and the smooth working of the federal judiciary. Is this not especially so where the railway is in truth seeking to escape the impact of statutes the constitutionality of which it admits is properly for consideration by the Supreme Court of the State, for as was pointed out by Mr. Justice Frankfurter in the *Pullman* case, *supra*, a decision by the State courts may avoid the necessity of a constitutional decision in the federal courts, and a ruling by a federal court

may prove to be supplanted by a subsequent controlling decision of a state tribunal.

The District Court declined to abstain from exercise of jurisdiction on the ground that there were no questions of novel, ambiguous or undecided state law involved. But *Burford* v. *Sun Oil Co., supra,* indicates that there is no such limitation, so long as there are "basic problems of state policy" involved, that problems of local law are to be left to local courts where each case may be handled as "one more item" in a continuous series of adjudgments. That this case is vital for the Alabama Public Service Commission and Alabama courts is made clear by the fact that this is the second in a series of such cases by Southern filed in the same judicial district, a third by another railroad has already been submitted to the same Court (*Atlantic Coast Line R. R. Co.* v. *Ala. Public Service Commission, et als.,* filed August 2, 1950, and the parties hereto well know that cases already are being readied by other railroads who, like Southern, are trying to escape the process of adjustment of a complex situation through local courts and make of the three-judge courts a tribunal for appeal of administrative orders.

Respectfully submitted,

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Filed Sept. 18, 1950. O. D. Street, Jr., Clerk, by Annie Schoolar, Deputy Clerk.

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, Its President, and JIMMY HITCHCOCK and C. C. (JACK) OWEN, Associate Commissioners; and A. A. CARMICHAEL, Attorney General of the State of Alabama, *Defendants*

Before McCord, Circuit Judge, Kennamer and Lynne, District Judges

LYNNE, *District Judge:*

Resting the jurisdiction of the district court upon the Federal question and amount in controversy provisions of Title 28, Section 1331, U. S. C. A., or upon the diversity of citizenship and amount in controversy provisions of Title 28, Section 1332, U. S. C. A., and that of a district court of three judges upon the provisions of Title 28, Section 2281, U. S. C. A., plaintiff, a Virginia corporation, complained of the Alabama defendants and prayed for both temporary and permanent injunctive relief against them.

Plaintiff's basic insistence is that the revenue derived from the operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, is grossly disproportionate to the direct expenses and that the continuation of such train service is not demanded or required by the public necessities.

Alleging the exhaustion of administrative remedies, plaintiff exhibits its petition for a permit allowing abandonment of such service, filed with defendant, Alabama Public Service Commission, September 13, 1948, pursuant to the

requirements of Title 48, Sections 35 and 106, Code of Alabama, 1940. There follow averments calculated to show undue delay in the hearing and consideration of the petition culminating in an adverse order entered by defendant Commission on April 3, 1950.

Emphasizing the impact of the Commission's order within the framework of the statutory scheme of regulating transportation companies, Title 48, Code of Alabama, 1940, plaintiff makes clear that it is impaled on the horns of a dilemma. If it continues the operation of such trains, it will lose substantial sums of money. If it ignores the Commission's order and abandons such services, it will face the imposition of severe sanctions under pertinent statutes. Either course, it complains, will result in irreparable damage unless this court grants injunctive relief.

Following the constitution of a three-judge district court in conformity with the provisions of Title 28, Section 2281, U. S. C. A., this action was, on May 8, 1950, set down for a hearing on plaintiff's prayer for a temporary injunction at Montgomery, Alabama, on May 22, 1950.

Upon its convocation, this court was met at the threshold with three several motions, in which all defendants joined, raising certain adjective problems relating to the jurisdiction of the court, the propriety of exercising such jurisdiction as it might be found to have, and the right of plaintiff to injunctive relief in any event.

At the conclusion of oral arguments, the court, after consultation announced its opinion that each of such motions was due to be overruled for reasons thereafter to be stated. Whereupon, it was stipulated by counsel for the parties that evidence should be adduced and the case submitted upon plaintiff's prayer for a permanent injunction.

I. Adopting a literal construction of the following language of Title 28, Section 2281, U. S. C. A.:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall

not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968."

defendants challenge the jurisdiction of this District Court of three judges because no attack is leveled at the constitutionality of the State statutes under which the defendant Commission acted. Since, it is argued, plaintiff does not seek an adjudication of unconstitutionality of such statutes but relies squarely upon the assertion that the order of the defendant Commission denying plaintiff the right to abandon the passenger train service concerned is confiscatory in effect and therefore violative of the Fourteenth Amendment to the Constitution of the United States, the quoted statute is manifestly inapplicable.

Dispositive of this contention is *Oklahoma Natural Gas Co.* v. *Russell* 261, U. S. 290, 43 S. Ct. 353, 67 L. E. 659 (1923), in which Mr. Justice Holmes, delivering the opinion for a unanimous court, stated:

"A doubt has been suggested whether these cases are within Sec. 266 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1162; as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013. The section originally forbade interlocutory injunctions restraining the action of state officers in the enforcement or execution of any statute of a State, upon the ground of its unconstitutionality, without a hearing by three judges. The amendment inserted after the words 'enforcement or execution of such statute' the words 'or in the enforceemnt or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such States' but did not change the statement of the ground, which still reads 'the unconstitutionality of such statute.' So if the section is contrued with narrow precision it may be argued that the unconstitutionality of the order is not enough. But this Court has assumed

repeatedly that the section was to be taken more broadly. Louisville & Nashville RR. Co. v. Finn, 235 U. S. 601, 604. Phoenix Ry. Co. v. Geary, 239 U. S. 277, 280, 281. Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission, 260 U. S. 212. Western & Atlantic R. R. v. Railroad Commission of Georgia, ante, 264. The amendment seems to have been introduced to prevent any question that such orders were within the section. It was superfluous as the original statute covered them. Louisville & Nashville R. R. Co. v. Garrett, 231 U. S. 298, 301, 318. Atlantic Coast Line R. R. Co. v. Goldsboro, 232 U. S. 548, 555. Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana, 221 U. S. 400, 403. But it plainly was intended to enlarge not to restrict the law. We mention the matter simply to put doubts to rest."

We hold that a Federal three-judge district court has jurisdiction to entertain a complaint alleging the unconstitutionality of an order of an administrative board or commission, acting under a State statute and praying for injunctive relief against the enforcement, operation or execution of such order, although no attack is made upon the validity of the statute itself.[1]

II. Insisting that this court should herein decline to exercise its jurisdiction, defendants first invoke the familiar doctrine of exhaustion of administrative remedies. Pointing to the provisions of Title 48, Section 79, et seq., Code of Alabama, 1940, defendants assert that the appellate procedure therein provided is a part of the administrative process.

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[1] *Herkness* v. *Irion. Comm. of Conservation, et al.*, 278 U. S. 92, 49 S. Ct. 40, 73 L. Ed. 198 (1928);

Ex Parte Williams Tax Comm., 277 U. S. 267, 48 S. Ct. 523, 72 L. Ed. 877 (1928);

Prendergast, et al. v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);

Louisville & N. R. Co. v. *Railroad Comm. of Ala.*, 208 Fed. 35 (D. C. Ala. 1913).

We do not agree. In *Avery Freight Lines, Inc.* v. *Persons*, 250 Ala. 40, 32 So. 2d 886 (1947), the Supreme Court of Alabama, in holding that an appeal to the Circuit Court under the statutes concerned was judicial and not legislative or administrative, observed:

> "Under the foregoing statutes • • • the circuit court can do only three things. (1) It can affirm the order of the Public Service Commission. (2) It can set aside the order of the Public Service Commission. (3) It can remand the case to the Public Service Commission for further proceedings in conformity with the direction of the court. The legislature evidently did not intend 'that the reviewing court should put itself in the place of the commission, try the matter anew as an administrative body, weigh the evidence and substitute its finding and judgment on the merits as that of the commission.' State v. Public Service Commission, 234 Mo. App. 470, 134 S. W. 2d 1069, 1076; Id., 348 Mo. 613, 154 S. W. 2d 777; 51 C. J. p. 758. See Alabama Public Service Commission v. Crow, 247 Ala. 120, 22 So. 2d 721."

After discussing a similar statutory design for judical review of administrative orders in *Bacon, et al. Public Service Comm. of State of Vermont* v. *Rutland Railroad Co.*, 232 U. S. 134, 138, 34 S. Ct. 283, 58 L. Ed. 538 (1914), the court said:

> "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case), is immaterial; the remedy in any event is purely judicial; to exonerate the appellant from an order that exceeds the law. This, we understand, is the view taken by the Supreme Court of the State, Bacon v. Boston & Maine R. R., 83 Vermont, 421, 457; Sabre v. Rutland R. R. Co., 86 Vermont,

347, 368, 369, and this being so, by the rule laid down in Prentis v. Atlantic Coast Line Co., the railroad company was free to assert its rights in the District Court of the United States."

We hold that defendant Commission's order denying plaintiff's petition terminated the administrative process, entitling plaintiff to resort immediately to this court for relief.[2] The failure of plaintiff to apply for a rehearing does not affect the result. Title 48, Section 76, Code of Alabama, 1940, permits an application for a rehearing before the Commission but does not require it. No Alabama case has been called to our attention, we have found none, holding that such an application must have been made before resorting to the statutory procedure for appeals to the State courts, to which we have referred. Moreover, in the absence of a statutory requirement making application for a rehearing a condition precedent to the right of judicial review, plaintiff was authorized to proceed in this court without first having availed itself of such a privilege.[3]

There is no merit in defendants' insistence that plaintiff must perforce litigate the validity of the alleged confiscatory order in the State courts. Jurisdiction of this court has been invoked by facts properly pleaded. Plaintiff had a choice of forums. It could have prosecuted an appeal to the Circuit Court of Montgomery, Alabama (Title 48, Section 79, Code of Alabama, 1940) or it could have invoked

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[2] *St. Louis-San Francisco Railway Co.* v. *Ala. Public Service Comm.*, 279 U. S. 560, 49 S. Ct. 383, 73 L. Ed. 843 (1929);

Prendergast, et al. v. *New York Telephone Co.*, 262 U. S. 43, 43 S. Ct. 466, 67 L. Ed. 853 (1923);

Bacon, et al. Public Service Comm. of State of Vermont v. *Rutland Railroad Co.*, 232 U. S. 134, 34 S. Ct. 283, 58 L. Ed. 538 (1914);

Chicago B. & O. R. Co. v. *Illinois Commerce Comm.*, 82 F. Supp. 368 (D. C. Ill. 1949);

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina*, 77 F. Supp. 675 (D.C. S. C. 1948).

[3] *Prendergast et al.* v. *New York Telephone Co., supra*, note 2.

Atlantic Coast Line R. Co. v. *Public Service Comm. of South Carolina, supra*, note 2.

the jurisdiction of this court in a plenary suit. We hold that, after the judicial stage is reached, a complainant alleging an order of a State commission to be confiscatory in violation of the Fourteenth Amendment may seek the protection of a Federal court even though the State law affords like procedure in the State courts.[4]

Conceding *arguendo* its jurisdiction, defendants urge this court to abstain from its exercise both under the principle of comity between Federal and State courts and under the doctrine of discretionary abstention. But "rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co.* v. *Russell, supra,* 261 U. S. 290, 293. Since no suit is pending at this time in any of the courts of the State of Alabama between the parties to, or involving the subject matter of, this litigation, we hold that rules of comity are inapplicable. *Southern Railway Co.* v. *Alabama Public Service Comm.*, 88 Supp. 441 (1950).

There is ample authority to the effect that if questions of novel, ambiguous or undecided State law are involved in a pending action and it appears that a State court adjudication would decide or render unnecessary the decision of Federal questions, the Federal court should retain jurisdiction but withhold its decision pending determination of

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[4] *Railroad Warehouse Comm. of Minnesota* v. *Duluth Street Ry. Co.*, 273 U. S. 625, 47 S. Ct. 489, 71 L. Ed. 807 (1927);

Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 44 S. Ct. 553, 68 L. Ed. 795 (1924);

Prendergast v. *New York Telephone Co., supra*, note 2.

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290, 43 S. Ct. 353, 67 L. Ed. 659 (1923);

Detroit & Mackinac R. R. Co. v. *Michigan R. R. Comm.*, 235 U. S. 402, 35 S. Ct. 126, 59 L. Ed. 288 (1914);

Bacon v. *Rutland Railroad Co., supra*, note 2.

Reagan v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 14 S. Ct. 1047, 38 L. Ed. 1014 (1894);

Central Kentucky Natural Gas v. *Railroad Comm. of Ky.*, 37 F. 2d 938 (1930);

Union Light, Heat & Power Co. v. *Railroad Comm.*, 17 F. 2d 143 (1926);

Van Wert Gaslight Co. v. *Pub. Utilities Comm. of Ohio*, 299 Fed. 670 (1924).

the matter by the State court with reasonable promptness.[5] We agree that the district court should stay its hand where the Federal question may not survive the decision of the State court as to the local law. But defendants cite no ambiguous, novel or undecided State law involved herein. The authority of the Commission to issue the order is not questioned. The statute under which it acted is not attacked. The Alabama law requires no definitive construction of authoritative interpretation. *Alabama Public Service Commission* v. *Atlantic Coast Line R. Co., supra.* We hold that the doctrine of discretionary abstention does not apply.

III. Maintaining that the allegations of the complaint afford no basis for injunctive relief in any event, defendants advert to the negative form of the Commission's order and assert that the effect of an injunction would be to interfere with the enforcement of State criminal statutes contrary to time-honored principles of equity.

It is conceded that the order is negative in form,[6] but its legal effect could hardly be more positive. Viewed against the statutory scheme adopted by the State to regulate transportation companies, such order is conclusive evidence that plaintiff has done all it could under the State law to get relief and could not get it. To save itself from irreparable

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[5] *Shipman* v. *Dupre,* — U. S. —, — S. Ct. —, 94 L. Ed. 537 (1950); *Railroad Comm. of Texas* v. *Pullman Co.,* 312 U. S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941); *Burford* v. *Sun Oil Co.,* 319 U. S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943); *Stainback* v. *Mo Hock Me Lok Po.,* 336 U. S. 368, 69 S. Ct. 606, 93 L. Ed. — (1949); *Chicago* v. *Fieldcrest Dairies,* 316 U. S. 163, — S. Ct. —, — L. Ed. — (1942); *A. F. L.* v. *Watson,* 327 U. S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); *Township of Hillsborough* v. *Cromwell,* 326 U. S. 620, 66 S. Ct. 53, 90 L. Ed. 415 (1945).

[6] The report and order of the Commission, after a statement of the case and a finding adverse to the railroad concludes: "Premises considered, IT IS ORDERED BY THE COMMISSION, that the petition of the Southern Railway Company filed on September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8, between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and it is hereby denied."

damage it must violate the State's criminal law and submit to its sanctions if State officers do their duty. This, equity does not require. Stripped of artificiality, the order amounts to a stark command by the State that plaintiff continue to furnish the train services involved or suffer the consequences of their abandonment. In view of the findings of fact and conclusions of law, *infra*,[7] we hold that in its impact on plaintiff's business it is affirmative in nature, having the practical effect of confiscating plaintiff's property in violation of the Fourteenth Amendment, and that it is clearly not within the rule of the cases relied upon by defendants.[8]

Equally tenuous is defendant's contention that the injunction prayed for would restrain enforcement of the criminal laws of Alabama in an unwarranted manner. To impart reality to the protection afforded plaintiff by the Fourteenth Amendment it is essential that this court restrain defendants from seeking to impose the sanctions of fines, penalties and forfeitures provided in Title 48, Code of Alabama, 1940. We are without jurisdiction to grant the relief which the Commission wrongfully withheld, namely, permission for plaintiff to abandon these train services. We are warranted in assuming that should we decline to interfere with the enforcement of the criminal laws of Alabama plaintiff would continue to operate these trains at a serious and growing loss, for while the threat of prosecution may be a goad, it is not the only inducement to law observance. Thus, it is not the threat of a multiplicity of prosecutions, but the finding of irreparable damage to plaintiff's property rights that is real, not fanciful, immediate, not remote, which moves us to grant an injunction. We know of no other manner of affording the relief to which plaintiff is entitled.

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[7] See Finding of Fact Nos. 15-38 and Conclusions of Law Nos. 11-17, *infra*.

[8] *Standard Oil* v. *United States*, 283 U. S. 235, 51 S. Ct. 429, 75 L. Ed. 999 (1931);
Piedmont & No. Ry. Co. v. *United States*, 280 U. S. 469, 50 S. Ct. 192, 74 L. Ed. 551 (1930).

Defendants rely heavily upon the following statement in *Beal, County Attorney of Douglas County, Nebraska, et al.* v. *Mo. Pac. R. Co.*, 312 U. S. 45, 61 S. Ct. 418, 85 L. Ed. 577 (1941);

> "It is a familiar rule that courts of equity do not ordinarily restrain criminal prosecutions. In re Sawyer, 124 U. S. 200, 211; Davis & Farnum Mfg. Co. v. Los Angeles, 189, U. S. 207; Hygrade Provisions Co. v. Sherman, 266 U. S. 497, 500. No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid. Terrace v. Thompson, 263 U. S. 197, 214; Packard v. Banton, 264 U. S. 140, 143; Tyson v. Banton, 273 U. S. 418, 428; Cline v. Frink Dairy Co., 274 U. S. 445, 452."

But it was also said in the Beal case, *supra:*

> "• • • that in view of the state of the record and certain concessions made by counsel on the argument here any further hearing of the issue of irreparable injury to respondent from a threatened multiplicity of suits has been waived. The reversal will accordingly be with instructions to the district court to dismiss the bill of complaint."

In the case at bar there was no concession or waiver of any claim of irreparable injury resulting from a multiplicity of suits or the deprivation of property without due process of law.

We hold that this case falls within the exception to the general rule and find apposite the following language in *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 47 S. Ct. 681, 71 L. Ed. 1146 (1927):

> "• • • The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings

to try the same right that is in issue before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. Fenner v. Boykin, 271 U. S. 240, 143; Packard v. Banton, 264 U. S. 140; Hygrade Provision Co. v. Sherman, 266 U. S. 497, 502; Terrace v. Thompson, 263 U. S. 197, 214; Ex Parte Young, 209 U. S. 123; Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207, 218; Dobbins v. Los Angeles, 195 U. S. 223, 236, 241; In re Sawyer, 124 U. S. 200, 209, 211."

Proceeding to the merits of the case, we hold that the plaintiff is entitled to the relief for which it prays and enter the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff, Southern Railway Company, is a corporation organized and existing under the laws of the State of Virginia, is engaged as a common carrier by railroad of persons and property between points within the State of Alabama, and between points within the State of Alabama on the one hand and points in other states throughout the South on the other hand, and is subject to the jurisdiction of the Alabama Public Service Commission and the Interstate Commerce Commission, respectively.

2. The defendant, Alabama Public Service Commission, consisting of a president and two associate commissioners, in an administrative body created under the laws of the State of Alabama (Title 48, Section 1, Code of Alabama, 1940), and thereby authorized to exercise certain regulatory powers over plaintiff (Title 48, Section 106, Code of Alabama, 1940). The principal office and official domicile of said Commission is located in the City of Montgomery, being within the Northern Division of the Middle judicial district of the State of Alabama. (Title 48, Section 11, Code of Alabama, 1940.) Defendant Persons is President, and

defendants Hitchcock and Owen are Associate Commissioners of said Commission and are citizens of the State of Alabama and residents of the City of Montgomery.

3. The defendant Carmichael is Attorney General for the State of Alabama, and is a citizen of the State of Alabama and resident of the City of Montgomery. Defendant Carmichael, as Attorney General of the State of Alabama, is by the statutes of said state charged with the supervision and control of legal proceedings in behalf of the State of Alabama and is attorney for defendant, Alabama Public Service Commission.

4. This is a suit of a civil nature between citizens of different states and arises under the Fourteenth Amendment to the Constitution of the United States. The matter in controversy, exclusive of interest and cost, exceeds the sum of $3,000.

5. Plaintiff complied with Title 48, Section 35 and Section 106, Code of Alabama, 1940, on the 13th day of September, 1948, by filing with defendant Commission an application for authority to discontinue the operation of two local intrastate passenger trains being operated daily between Tuscumbia, Alabama, and Chattanooga, Tennessee.

6. The defendant Commission set said application down for hearing at Huntsville, Alabama, for June 2, 1949. The hearing was continued by the Commission until August 4, 1949, and again until October 6, 1949, when it was heard by two representatives of the Commission, none of the defendant commissioners being present thereat.

7. On April 3, 1950, the Commission entered its report and order and denied plaintiff's application.

8. Plaintiff seeks a temporary and permanent injunction against the defendants, separately and severally, from proceeding to enforce sanctions provided under the law of the State of Alabama for the failure or refusal of plaintiff to continue the operation of local passenger trains Nos. 7 and 8 within the State of Alabama in violation of order No. 11988, entered by defendant Commission April 3, 1950, and

that said order be declared unlawful, null, void and of no effect.

9. On September 13, 1948, a notice was posted at each affected station in Alabama that plaintiff had petitioned the Alabama Public Service Commission for authority to discontinue local trains Nos. 7 and 8. These notices remained posted for a period of ten days in compliance with the rule of defendant Commission.

10. Local train No. 7 leaves Chattanooga, Tennessee, and makes scheduled or flag stops at the following towns in Alabama: Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro, Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton, and Sheffield-Tuscumbia. Local Train No. 8 makes the same trip in reverse, starting at Sheffield-Tuscumbia and ending at Chattanooga, Tennessee.

11. Train No. 7 leaves Chattanooga, Tennessee, at 4:15 P. M. and arrives at Sheffield-Tuscumbia, Alabama 9:05 p. m. Train No. 8 leaves Sheffield-Tuscumbia, Alabama, at 5:55 a. m. and arrives at Chattanooga, Tennessee, at 10:50 a. m.

12. In addition to local trains Nos. 7 and 8, plaintiff operates trains Nos. 35 and 36, and trains Nos. 45 and 46 between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama. Train No. 35 leaves Chattanooga, Tennessee, at 7:00 A. M. and arrives at Sheffield-Tuscumbia, Alabama, at 12:20 p. m. Train No. 36 leaves Sheffield-Tuscumbia, Alabama, at 12:40 p. m. and arrives at Chattanooga, Tennessee, at 6:00 p. m. Train No. 45 leaves Chattanooga, Tennessee, at 11:50 p. m. and arrives at Sheffield-Tuscumbia, Alabama, at 4:10 a. m. Train No. 46 leaves Sheffield-Tuscumbia, Alabama, at 11:10 p. m. and arrives at Chattanooga, Tennessee, at 3:10 a. m. Trains Nos. 35 and 36 make a scheduled stop or flag stop at the following towns in Alabama:

Stevenson, Fackler, Hollywood, Scottsboro, Larkinsville, Limrock, Woodville, Paint Rock, Gurley, Brownsboro,

Chase, Huntsville, Madison, Belle Mina, Decatur, Trinity, Hillsboro, Wheeler, Courtland, Town Creek, Leighton to Sheffield-Tuscumbia. Trains Nos. 45 and 46 make a scheduled stop or flag stop at Chattanooga, Tennessee, and the following towns in Alabama. Stevenson, Scottsboro, Huntsville, Decatur and Sheffield-Tuscumbia.

13. Odd number trains 7, 35 and 45 operate westbound from Chattanooga, Tennessee, to Sheffield-Tuscumbia, Alabama. Even number trains 8, 36 and 46 operate eastbound from Sheffield-Tuscumbia, Alabama, to Chattanooga, Tennessee. All six trains are operated daily and carry passengers, mail and express.

14. The passenger coaches used on trains Nos. 7 and 8 are of steel construction, electric lighted, steam heated, equipped with electric fans, flush toilets, window screens, drinking fountains and smoking compartment. The equipment is generally cleaned at Sheffield and Chattanooga, and repaired at Chattanooga.

15. It requires ten men to operate trains Nos. 7 and 8, five men in each direction. Each crew is composed of an engine crew of engineer and fireman and a train crew of conductor, flagman and baggageman. On Saturday and Sunday a porter is employed as an extra member on each train.

16. The few passengers that ride local trains Nos. 7 and 8 make a short-haul from one local town to another of about 5½ to 10 miles distance.

17. If trains Nos. 7 and 8 are discontinued, no station between Chattanooga, Tennessee, and Sheffield-Tuscumbia, Alabama, would be closed for that reason.

18. Statistical information concerning the operation of trains Nos. 7 and 8 for the twelve months ending February 29, 1948, shows that "actual" direct expenses ($87,524.05) very nearly approximate total gross revenue earned ($98,842.92). With "apportioned" direct expenses added, the twelve-months' operation resulted in an excess of direct expenses over total revenue of $78,710.74. Stated differ-

ently, the railway spends $1.80 to earn $1.00 of gross revenue.[9]

19. For the twelve-month period ending February 28, 1949, "actual" direct expenses ($90,993.77) exceeded total gross revenue ($79,956.27). With "apportioned" direct expenses added, direct expenses exceed total revenue by $102,326.93. Stated differently, the Railway paid out $2.28 to earn $1.00 of gross revenue.

20. For the five-month period ending July 31, 1949, "actual" direct expenses ($40,819.57) exceeded total gross revenue ($30,745.28). With "apportioned" direct expenses added, direct expenses exceeded total revenue by $53,692.56. The plaintiff railroad paid out $2.75 to earn $1.00 of gross revenue.

21. The average number of passengers on trains Nos. 7 and 8 per train mile decreased from 26.63 for the twelve months ending February 29, 1948, to 18.13 for the twelve months ending February 28, 1949, and to 13.92 for the five months ending July 31, 1949. The average number of passengers per train mile on all other Southern Railway passenger trains was 84.65 for the twelve months ending February 29, 1948, 76.30 for the twelve months ending February 28, 1949, and 67.93 for the five months ending July 31, 1949.

22. The average revenue from passengers per train mile for trains Nos. 7 and 8 decreased from 54.90 cents for the twelve months ending February 29, 1948, to 37.35 cents for the twelve months ending February 28, 1949, and to 29.22 cents for the five months ending July 31, 1949; this contrasts with all other Southern Railway passenger trains,

[9] In these and the following computation the term "actual" direct expenses includes the wages for the train and engine crews, payroll tax, railroad retirement and unemployment insurance, train fuel and damage to livestock on the right of way. The term "apportioned" direct expenses includes engine house expenses, water, lubricants, supplies and repairs for passenger locomotives and train cars, costs of trackage over N. C. & S. L., and the Chattanooga station company expenses. Nothing was included for maintenance of way, track and structures, station, yard, all traffic expenses, general supervision, taxes except payroll, fixed charges, depreciation or return on investment.

with an average of 192.81 cents for the twelve months ending February 29, 1948, 195.92 cents for the twelve months ending February 28, 1949, and 183.67 cents for the five months ending July 31, 1949.

23. Plaintiff's operation of its entire passenger business for the period 1931-1941, inclusive, resulted in a net operating deficit of $55,262,779. For the period 1942-1945, inclusive, passenger operations produced a net operating income of $44,938,879. For the post-war years, 1946-1948, inclusive, passenger operations resulted in a net operating deficit of $20,796,189. However, for the same respective periods, plaintiff's net freight service operating income was as follows: for the years 1931-1941, inclusive, $233,815,273; for the years 1942-1945, inclusive, $97,305,303; for the years 1946-1948, inclusive, $90,631,088. By combining the results of passenger and freight service, it appears that plaintiff's net operating income was as follows: for the years 1931-1941, inclusive, $178,552,494; for the years 1942-1945, inclusive, $142,244,182; and for the years 1946-1948, inclusive, $69,834,899.

24. For each year 1936-1941, inclusive, plaintiff's operation of passenger service within the State of Alabama resulted in a net operating deficit, the total for such period having been $3,962,525. For each year 1942-1945, inclusive, there was a net operating income, the total for such period having been $2,946,758. For each year 1946-1948, inclusive, there was a net operating deficit, the total for such period having been $2,872,505. The plaintiff's operation of freight service within the State of Alabama resulted in the following: for the years 1936-1941, inclusive, a net operating income of $13,012,218; for the years 1942-1945, inclusive, a net operating income of $13,934,056; and, for the years 1946-1948, inclusive, a net operating income of $10,667,882. Taking these two sets of figures together, the plaintiff's operation within the State of Alabama resulted in a net railway operating income from both passenger and freight service for the years 1936-1941, inclusive, of $9,049,693; for the years 1942-1945, inclusive, of $16,880,814, and for the years 1946-1948, inclusive, of $7,795,377.

25. Comparing 1948 with 1936, plaintiff's average receipts per passenger mile throughout its entire system increased 47%, whereas the average annual compensation per employee increased 109%, materials and supplies 134% and payroll taxes 1,344%.

26. For the Southern Railway Company as a whole, the average yearly gross revenue from passengers was: for the years 1921-1930, inclusive, $27,956,720; for the years 1931-1941, inclusive, $9,573,645; for the years 1942-1945, inclusive, $52,639,553; and for the years 1946-1948, inclusive, $25,195,733.

27. A comparison of the distribution of inter-city passenger traffic in the United States for the years 1926 and 1948 shows that in 1926 the steam roads handled 21.9%, in 1948 only 11.4%, a decrease of 48%. Private automobiles in 1926 transported 70.9%; in 1948, 79.7%, an increase of 12%. Busses transported 2.7% in 1926 and 6.6% in 1948, an increase of 144%.

28. For the year ending February 29, 1948, the daily average revenue from passengers on trains Nos. 7 and 8 was $180.94, whereas the daily average total of wages, payroll tax and fuel was $238.04. For the year ending February 28, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $124.74, whereas the daily average total of wages, payroll tax and fuel was $276.19. For the five-month period, March 1, through July 31, 1949, the daily average revenue from passengers on trains Nos. 7 and 8 was $97.02, whereas the daily average total of wages, payroll tax and fuel was $265.26. For the eight-month period, August 1, 1949, through March 31, 1950, the daily average revenue from passengers on trains Nos. 7 and 8 was $83.11, whereas the daily average total of wages, payroll tax and fuel was $278.57.

29. Prior to 1946, plaintiff operated a diesel-electric power unit, the "Joe Wheeler," on the run now served by trains Nos. 7 and 8, but after several years of experimentation, discontinued its operation because of the uneconomical results which obtained.

30. Plaintiff is not a common carrier of the United States mail. The collection and delivery of all mail is the function of the United States Government, exclusively.

31. The line of railroad traversed by trains Nos. 7 and 8 from Bridgeport, Alabama, to Sheffield-Tuscumbia, Alabama, is closely paralleled by hard surface highways and many of the communities along the railroad are located directly on important east-west highways. Several of the larger communities are also located on important north-south highways. The Lee Highway (U. S. No. 72) closely parallels the line of railroad from the Alabama-Tennessee state line to Huntsville, from which point the railroad runs southwesterly to Decatur, and then generally westerly to Tuscumbia. From Huntsville to Tuscumbia the line of railroad is closely paralled by the Joe Wheeler Highway (Ala. No. 20).

32. The American Bus Lines operate thirteen round trips daily between Florence and Huntsville. Seven of these schedules operate easterly over State Highway No. 20 between Tuscumbia and Huntsville, while six schedules operate westerly from Huntsville to Tuscumbia, via State Highway No. 20. The remaining schedules, east and west, operate over U. S. Highway No. 72 via Athens. Some of these busses operate in through service between Memphis and Charlotte and Memphis and Asheville. Eight round trips are operated daily between Florence and Chattanooga. Not less than seventy busses arrive in or depart from Huntsville daily. Decatur is also served by the Southeastern Greyhound Lines, operating nine round trips daily between Nashville and Birmingham.

33. The steps, in timetable order, populations and bus service available for each of the towns traversed by trains Nos. 7 and 8 between Stevenson and Sheffield-Tuscumbia are as follows:

(a) Bridgeport, an agency station (NC&StL) in an incorporated community with a population according to the 1940 federal census of 2031 (2124 in 1930):

Located on U. S. Highway No. 72.

Six busses daily between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of Southern Railway Company.

(b) Stevenson, an agency station in an incorporated community with a population according to the 1940 federal census of 793 (733 in 1930):

Located on U. S. Highway No. 72.

Six busses between Florence and Chattanooga and seven busses daily between Chattanooga and Florence plus an additional round trip daily between Scottsboro and Chattanooga via American Bus Lines.

Also served by daily trains of the NC&StL and other daily trains of the Southern Railway Co.

(c) Fackler, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on gravel road about two miles from U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

Bus service along U. S. Highway No. 72.

(d) Hollywood, an agency station in an incorporated community with a population according to the 1940 federal census of 311 (274 in 1930):

Located on gravel road about one mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also served by other daily trains of Southern Railway.

(e) Scottsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 2834 (2304 in 1930):

Located at junction of U. S. Highway No. 72 and State Primary Highways Nos. 32 and 35.

Eight busses daily in each direction between Florence and Huntsville and Chattanooga via American Bus Lines.

One bus daily in each direction between Scottsboro and Chattanoogo via American Bus Lines.

Two round trips daily between Scottsboro and Flat Rock via Northeast Alabama Bus Co., Inc.

Four round trips daily between Ft. Payne and Guntersville via Northeast Alabama Bus Co., Inc.

Also served by other daily trains of Southern Railway Co.

(f) Larkinsville, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by other daily trains of Southern Railway Co.

(g) Limrock, a non-agency station in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by other daily trains of Southern Railway Co.

(h) Woodville, an agency station in an incorporated community with a population according to the 1940 federal census of 183 (196 in 1930):

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also flag stop for Southern Railway daily trains 35 and 36.

(i) Paint Rock, an agency station in an incorporated community with a population according to the 1940 federal census of 282 (320 in 1930):

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(j) Gurley, an agency station in an unincorporated community with an estimated population of 500 within sight of the station:

Located on U. S. Highway No. 72.

Six busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(k) Brownsboro, an agency station in an unincorporated community with an estimated population of 75 within sight of the stopping place:

Located on hard surface road about six-tenths of a mile from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72.

Also flag stop for daily Southern Railway trains 35 and 36.

(l) Chase, a joint agency station (with NC&StL) in an unincorporated community with an estimated population of 50 within sight of the stopping place:

Flag stop for train No. 7 and regular stop for train No. 8

Located on hard surface road about two miles from U. S. Highway No. 72.

Bus service along U. S. Highway No. 72 (Chase Road) between Florence and Chattanooga. Also bus service along unnumbered road between Huntsville and Shelbysville, Tenn. via Cherokee Motor Coach Lines.

Also served by daily except Sunday, mixed trains of the NC&StL, operating between Decherd, Tenn. and Huntsville, about 48 miles.

Also flag stop for daily Southern Railway trains 35 and 36.

(m) Huntsville, an agency station in an incorporated community with a population according to the 1940 federal census of 13,050 (11,554 in 1930):

Located at junction of U. S. Highways Nos. 24, 72 and 241 and State Primary Highway No. 20.

Eight busses daily in each direction between Florence and Chattanooga via American Bus Lines.

Thirteen busses daily in each direction between Florence and Huntsville (seven via Tuscumbia eastbound and six via Tuscumbia westbound—the remaining schedules via Athens) via American Bus Lines.

Five busses daily in each direction from and to New Market (four each way from and to Winchester, Tenn.) via Cherokee Motor Coach Lines.

Nine busses daily to and from Nashville, Tenn. via Crescent Stages, Inc.

Eight busses daily to and from Montgomery, Ala., via Crescent Stages Inc.

Eleven busses daily to and from Anniston, Alabama, via Crescent Stages, Inc.

Nine busses daily to and from Sylacauga, Ala. (with connections to and from Birmingham) via Crescent Stages, Inc.

Also served by other daily trains of Southern Railway Co.

Also served by daily, except Sunday, mixed trains of NC&StL between Decherd, Tenn. and Huntsville, about 48 miles.

(n) Madison, an agency station in an incorporated community with a population according to the 1940 federal census of 455 (431 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Decatur and Huntsville and six busses daily between Huntsville-Decatur and Florence via America Bus Lines.

Connection at Huntsville from and to Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(o) Belle Mina, an agency station in an unincorporated community with an estimated population of 200 within sight of the stopping place:

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville via Decatur and six busses daily between Huntsville and Tuscumbia-Florence via Decatur via American Bus Lines.

Also flag stop for daily Southern Railway trains 35 and 36.

(p) Decatur, an agency station in an incorporated community with a population according to the 1940 federal census of 16,604 (15,593 in 1930):

Located at junction of U. S. Highway No. 31 and State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines. Connections at Huntsville from and to Chattanooga.

Three busses daily in each direction to and from Red Bay, Ala., via Red Bay Bus Lines.

Four busses daily in each direction from and to Moulton, Ala., via Red Bay Bus Lines.

Nine busses daily in each direction between Birmingham and Nashville via Southeastern Greyhound Lines.

Also served by other daily Southern Railway trains in addition to daily L&N trains between Cincinnati-Birmingham and beyond.

(q) Trinity, a non-agency stop in an incorporated community with a population according to the 1940 federal census of 249 (208 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Folrence and Huntsville with connections at Huntsville to and from Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(r) Hillsboro, an agency station in an incorporated community with a population according to the 1940 federal census of 292 (240 in 1930):

Located on hard surface road about one mile from State Highway No. 20.

Bus service along State Highway No. 20 between Florence and Huntsville with connection at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(s) Wheeler, a non-agency station with an estimated population of 100 within sight of the station:

Located on State Highway No. 20.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and Florence via American Bus Lines with connections at Huntsville from and to Chattanooga.

Also flag stop for daily Southern Railway trains 35 and 36.

(t) Courtland, an agency station in an incorporated community with a population according to the 1940 federal census of 454 (359 in 1930):

Located on State Highway No. 20 near junction with State Highway No. 36, the latter highway connecting State Highways Nos. 20 and 24.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville-Tuscumbia and Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

(u) Town Creek, an agency station in an incorporated community with a population according to the 1940 federal census of 637 (427 in 1930):

Located at junction of State Highway No. 20 and State Highway No. 101, the latter highway connecting State Highway No. 20 and U. S. Highway No. 72.

Seven busses daily between Florence and Huntsville and six busses daily between Huntsville and Florence via American Bus Lines.

Also served by daily Southern Railway trains 35 and 36.

(v) Leighton, an agency station in an incorporated community with a population according to the 1940 federal census of 810 (670 in 1930):

Located on State Highway No. 20.

Seven busses daily between Florence-Tuscumbia and Huntsville and six busses daily between Huntsville and Tuscumbia-Florence via American Bus Lines with connections at Huntsville to and from Chattanooga.

Also served by daily Southern Railway trains 35 and 36.

34. The motor vehicle registration in the State of Alabama for the year 1948 shows 391,704 automobiles, 3,859 busses and 137,511 trucks.

35. The number of inhabitants per registered automobile in the counties of Alabama through which trains Nos. 7 and

8 run are as follows: Colbert, 6.2; Lawrence, 11; Limestone, 8.8; Morgan, 7.5; Madison, 7.4; Jackson, 12.9; and, for the State of Alabama, the number of inhabitants per registered automobile is 7.8.

36. There is adequate highway motor freight service along the route traversed by trains Nos. 7 and 8, and each city or town is serviced by one or more of the following interstate highway motor freight carriers:

Baggett Transportation Co.
Birmingham-Huntsville Transport, Inc.
Fayetteville Transfer Co.
Loo-Mac Freight Lines.
Malone Freight Lines, Inc.
Martin Motor Express.
Neely-Ross Motor Express, Inc.
North Alabama Motor Express, Inc.
Roadway Express, Inc.
Silver Fleet Motor Express, The.
Valley Truck Lines, Inc.
Mohawk Motor Lines, Inc.
Dixie-Ohio Express Co.
Gordon's Transports, Inc.
Hoover Motor Express Co., Inc.
McCullough & Sanderson.
Inter-City Trucking Co.
Meeks Motor Freight.

37. The passenger transportation revolution, resulting from the construction of a vast network of highways, improvement of the private automobile, and the availability of bus service, has transferred passenger transportation needs from the railroad to the highway.

38. The convenience of the private automobile and busses has outmoded local passenger trains Nos. 7 and 8 and caused them to become an undesirable form of transportation.

Conclusions of Law

1. Plaintiff's suit arises under the Fourteenth Amendment to the United States Constitution and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

2. This court has jurisdiction of the parties and of the subject matter.

3. The questions for decision present no unresolved question of State law.

4. Under the provisions of Title 48, Sections 35 and 106, Code of Alabama, 1940, plaintiff is required to obtain a permit from Alabama Public Service Commission before discontinuing regularly scheduled passenger trains.

5. Defendants Persons, Hitchcock, and Owen, as the President and Associate Commissioners of the Alabama Public Service Commission, are charged with the duty of regulating and controlling transportation companies (Title 48, Section 104, et seq., Code of Alabama, 1940).

6. Defendant Carmichael, as Attorney General of the State of Alabama, is charged with the duty of enforcing all orders of the Alabama Public Service Commission and the sanctions provided in Title 48, Code of Alabama, 1940.

7. The Alabama Public Service Commission is charged with the duty of supervising, regulating and controlling all transportation companies doing business in the State in specified particulars, including the maintenance of such public service as may be reasonable and just. Title 48, Section 104, Code of Alabama, 1940.

8. In Alabama the duty to maintain such public service as may be reasonable and just is not imperative but is relative. "In order to justify a reduction of the service, the carrier is not required to show that the rate of return on the system requires the reduction, or that it would impede interstate commerce, but it is sufficient if the reduced plan would supply such train service as the public necessities demand and require (cases cited)." *Ala. Pub. Serv.*

Comm. v. *Atlantic Coust Line R. Co.*, — Ala. —, 45 So. 2d 449 (1950).

9. Plaintiff is under no obligation to continue to offer a service which the public will not use, where the offer is a financial burden, and where it is unreasonable to demand its continuance.

Thompson v. *Boston & Maine R.R.*, 86 N. H. 204, 166, A.249;

Atlantic Coast Line R. R. v. *Public Service Comm. of So. Carolina, supra;*

Alabama Public Service Comm. v. *Atlantic Coast Line R. Co., supra.*

10. The controlling criteria in determining whether local passenger trains may be discontinued are these: the character and population of the territory served, the public patronage, or lack of it, the facilities remaining, the expense of operation as compared with revenue from same, and the operations of the carrier as a whole,

Atlantic Coast Line R.R. v. *Public Service Comm. of So. Carolina, supra;*

Ala. Pub. Serv. Comm. v. *Atlantic Coast Line R.R., supra.*

11. If plaintiff continues to operate local trains Nos. 7 and 8, it will suffer irreparable damage by expending sums grossly disproportionate to revenue in a situation where there is no public necessity or demand for such service.

12. If plaintiff fails to operate local trains Nos. 7 and 8, plaintiff will be subjected to irreparable loss by incurring liability under sanctions imposed by Title 48, Code of Alabama, 1940, including Sections 110, 399, 400 and 405.

13. Plaintiff has no adequate remedy at law.

14. Plaintiff will suffer irreparable damage unless this court permanently enjoins defendants and their successors in office from seeking to impose the sanctions provided by Title 48, Code of Alabama, 1940, upon discontinuance by plaintiff of operation of its passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee,

in opposition to the order of the defendant Commission, Docket No. 11988, April 3, 1950.

15. Order No. 11988, of April 3, 1950, rendered by the defendant Commission denying plaintiff permission to discontinue local trains Nos. 7 and 8 is unjust, unreasonable and confiscatory and deprives plaintiff of its property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States since there is no longer public necessity for this service and plaintiff is operating at a large financial loss.

16. Plaintiff owes no common carrier obligation, either to the United States or to the General Public to transport the United States Mail.

17. Plaintiff is entitled to a permanent injunction enjoining defendants Alabama Public Service Commission, Gordon Parsons, its President, Jimmy Hitchcock and C. C. Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Alabama, together with the successors in office of each of them, and their agents, servants and attorneys from pursuing any of the remedies of mandamus, injunction, fine, forfeiture or penalty provided in Title 48, Sections 110, 399, 400 and 405, Code of Alabama, 1940, or otherwise, for the purpose of compelling plaintiff to continue to operate local trains Nos. 7 and 8 between Sheffield-Tuscumbia, Alabama, and Chattanooga, Tennessee, pursuant to Title 48, Sections 35 and 106, Code of Alabama, 1940, and the order of the Alabama Public Service Commission, Docket No. 11988, of April 3, 1950.

Done at Montgomery, Alabama, this the 20 day of July, 1950.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed July 20, 1950. O. D. Street, Jr., Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 681

SOUTHERN RAILWAY COMPANY, a Corporation, *Plaintiff*,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, GORDON PERSONS, its President and Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners; and A. A. Carmichael, Attorney General of the State of Alabama, *Defendants*

This cause coming on to be heard before a duly constituted three-judge district court and having been submitted by agreement of the parties for final decree upon the pleadings in the cause and upon the evidence offered herein, including a transcript of the testimony presented at the hearing before the defendant, Alabama Public Service Commission, held at Huntsville, Alabama, on October 6, 1949, for the reasons set forth in the findings of fact, conclusions of law and the opinion of the Court filed herein:

It is now Ordered, Adjudged and Decreed this 20th day of July, 1950, as follows, viz:

(1) That the motion of the defendants to dismiss and the several motions of the defendants to stay proceedings in this cause be and the same are hereby denied;

(2) That the order of the defendant, Alabama Public Service Commission, dated April 3, 1950, denying the petition of plaintiff filed September 13, 1948, requesting authority to discontinue the operation of passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated in the State of Alabama, be and the same is hereby vacated and declared to be null, void and of no effect;

(3) That the defendants, Alabama Public Service Commission, Gordon Persons, its President, Jimmy Hitchcock and C. C. (Jack) Owen, Associate Commissioners, and A. A. Carmichael, Attorney General of the State of Ala-

bama, together with the successors in office of each of them, and their agents, servants and attorneys, be and they are hereby permanently enjoined from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of said order or to enforce any fines, forfeitures, penalties or other sanctions provided by Title 48, Code of Alabama, 1940, or any remedies against the plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing the operation of plaintiff's passenger trains Nos. 7 and 8 between Tuscumbia, Alabama, and Chattanooga, Tennessee, in so far as they are operated within the State of Alabama; and,

(4) That the costs of court incurred in this cause be and the same are hereby taxed against the defendants, for which execution may issue.

LEON MCCORD,
United States Circuit Judge.
C. B. KENNAMER,
United States District Judge.
SEYBOURN H. LYNNE,
United States District Judge.

Filed July 20, 1950. O. D. Street, Jr., Clerk.

Appendix "B"

Alabama Statutes

Code of Alabama 1940, Title 48:

Sec. 35. Abandonment of service, regulated:—No utility shall abandon all or any portion of its service to the public except ordinary discontinuance of service for nonpayment of charges, nonuser and similar reasons in the usual course of business, unless and until written application is first made to the commission for the issuance of a certificate that the present or future public convenience or necessity permits such abandonment, and the issuance of such a certificate. Upon the filing of such application and after a hearing of all parties interested, the commission may, or may not, in its discretion, issue such certificate.

Sec. 50. Attorney General to represent commission; special counsel provided for:—The attorney shall represent the public service commission in any and all legal proceedings which it may have the power to institute and which, pursuant to such power, it has instituted, and in all legal proceedings against it, and shall institute such legal proceedings which the commission may request or deem necessary, provided it has the power to institute them, to enforce the provisions of this title or compel obedience to and observance of the same by any person, firm, company, or corporation, upon which such obedience or observance is imposed. The attorney general with the approval of the governor may employ any special counsel to institute or defend such legal proceedings or to assist the attorney general therein, and to contract with the special counsel concerning a reasonable compensation for his or their services, which compensation shall be paid out of the treasury on a warrant drawn by the comptroller on the treasury upon approval by the governor. (1907, p. 43).

Sec. 76. Rehearings.—Any time after an order has been made by the commission, any person interested therein may apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such re-

hearing within sixty days after the said application therefor has been filed, and such rehearing shall be subject to such rules as the commission may prescribe. Application for such rehearing shall not excuse any utility or person from complying with or obeying an order of the commission, or operate in any manner to stay or postpone the enforcement thereof except as the commission may by order direct. Any order of the commission made after such rehearing shall have the same force and effect as an original order, but shall not affect any right, or the enforcement of any right, arising from or by virtue of compliance with the original order prior to the order made after rehearing.

Sec. 78. Courts may compel compliance with orders of commission and punish failure.—In case of failure or refusal on the part of any person to comply with any valid order of the commission or of any commissioner, or any subpoena, or on the refusal of any witness to testify or answer as to any matter regarding which he may be lawfully interrogated, any circuit court in this state, or any judge thereof, on application of a commissioner, may issue an attachment for such person and compel him to comply with such order, or to attend before the commission and produce such documents and give his testimony upon such matters as may be lawfully required, and the court or judge shall have power to punish for contempt as in cases of disobedience of a like order or subpoena issued by or from such court, or a refusal to testify therein.

Sec. 79. Appeals from orders of commission.—From any final action or order of the commission in the exercise of the jurisdiction, power, and authority conferred upon it by this title, an appeal therefrom shall lie to the Circuit Court of Montgomery County, sitting in equity, except appeals under chapter three of this title, and thence to the supreme court of Alabama. All appeals shall be taken within thirty days from the date of such action or order and shall be granted as a matter of right and be deemed perfected by filing with public service commission a bond for security of cost of said appeal when the appellant is a utility or person, and by filing notice of an appeal when

the appellant is the State of Alabama. (1909, p. 96; 1932, Ex. Sess., p. 233.)

Sec. 81. Right to supersede order.—On any such appeal any utility, interested party, or intervenor may supersede any decree rendered by giving such supersedeas bond or bonds as may be appropriate to the proceedings as provided for herein for superseding an order or orders of the commission.

Sec. 82. Proceedings on appeal.—The commission's order shall be taken as prima facie just and reasonable. No new or additional evidence may be introduced in the circuit court except as to fraud or misconduct of some person engaged in the administration of this title and affecting the order, ruling or award appealed from, but the court shall otherwise hear the case upon the certified record and shall set aside the order if the court finds that: the commission erred to the prejudice of appellant's substantial rights in its application of the law; or, the order, decision or award was procured by fraud or was based upon findings of facts contrary to the substantial weight of the evidence. Provided, however, the court may, instead of setting aside the order, remand the case to the commission for further proceedings in conformity with the direction of the court. The court may, in advance of judgment and upon a sufficient showing, remand the cause to the commission for the purpose of taking additional testimony or other proceedings. (1932, Ex. Sess., p. 233.)

Sec. 84. Appeal does not supersede order:—supersedeas bond.—No appeal shall stay or supersede the order or action appealed from unless the appellate court or judge thereof, upon hearing and notice, after consideration of the testimony, taken before the commission, shall so direct. If the appeal be from an order of the commission reducing or refusing to increase such rates, fares, charges, or any of them, or any schedule, or part or parts, of any schedule of such rates, fares or charges, the appellate court, or judge thereof, shall not so direct or order a supersedeas or stay of the action or order appealed from without requiring as a condition precedent to the granting of said supersedeas

that the utility applying for the same shall execute and file with the clerk of said court a bond, which bond shall be as hereinafter provided.

Section 106. Permit to abandon service.—No transportation company subject to this chapter shall abandon all or any portion of its service to the public or the operation of any of its lines, properties, or plant which would affect the service it is rendering the public, except ordinary discontinuances of service for nonpayment of charges, nonuser, violations of rules and regulations or similar reasons in the usual course of business, unless and until there shall first have been filed an application for a permit to abandon service and obtained from the commission a permit allowing such abandonment.

Sec. 399. Penalty for charging excessive rates, granting rebates, or violating commission's order, etc.—Any utility doing business in this state, or any of its authorized agents, officers or employees, who is guilty of knowingly or willfully charging, demanding, or receiving any rate or charge for any commodity or service different from that authorized by its lawful tariffs on file with the Alabama public service commission, or who is guilty of knowingly or willfully granting or giving to any person or persons any concession or rebate in respect of its lawful charges or rates, or who knowingly or willfully violates, or procures, aids or abets a violation of, any lawful order or decree of said commission, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than one thousand dollars for each offense. In the case of a violation of said commission's orders or decrees, each day's violation shall be deemed to be a separate offense. (Ib.; 1932, Ex. Sess., p. 209.)

Section 400. Violations of statutes as to reasonable rates, adequate service and unjust discriminations; penalty.—Every officer, agent or employee of such common carrier or railroad corporation who shall violate or procure, aid or abet any violation by such common carrier, or railroad corporation, of any of the statutes of this state relating to reasonable rates, adequate service, and unjust discrimi-

nations of the public service of any common carrier of this state, or who shall fail to obey, observe, or comply with any order of the public service commission, or any provisions of any order of said commission, or who procures, aids or abets any such common carrier, or corporation, in its failure to obey, observe, and comply with any such order, direction, or provision relating to reasonable rates, adequate service and unjust discrimination by common carriers of this state, shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one thousand dollars, to be fixed by the court. (1907, p. 23.)

United States Statutes.

United States Code, Title 28:

Sec. 1253. Direct appeals from decisions of three-judge courts.

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Sec. 2101. Supreme Court; time for appeal or certiorari; docketing stay.

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or writ of certiorari intended to bring any judgment or decree in a civil action, suit or pro-

ceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay. As amended May 24, 1949, c. 139, Sec. 106, 63 Stat. 104.

Sec. 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

Sec. 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by an Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the state.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or ageney of the United States, at least five days' notice of the hearing shall be given the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail by the clerk, and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial,

and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary of final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days' notice served upon the attorney general of the State.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION et als.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

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INDEX.

Cases Cited.

Statutes Cited.

SUPREME COURT OF THE UNITED STATES.

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Appeal from the United States District Court
for the Middle District of Alabama.

BRIEF FOR THE APPELLANTS.

OPINION BELOW.

This case is reported below as **Southern Railway Company v. Alabama Public Service Commission et al.**, 91 F. Supp. 980.

JURISDICTION.

The jurisdiction of this Court is based upon 28 U. S. C. 1253 and 2101 (b), providing for direct appeal to the Supreme Court of the United States within sixty days from an order granting or denying an interlocutory or permanent injunction in any case required to be determined by a district court of three judges, this being an appeal from the granting of an injunction by a three-judge district court specially constituted under 28 U. S. C. 2281 and 2284.

QUESTIONS PRESENTED.

A special three-judge district court was constituted under 28 U. S. C. 2281 and 2284, which sections relate to injunctions against enforcement of state statutes or orders of state administrative agencies alleged to be unconstitutional.

1. Should such court enjoin enforcement of criminal laws of a state where admittedly there have been no threats of multiple prosecutions or of any prosecutions at all?

2. Should such court withhold equitable relief on the ground that plaintiff is not threatened with irreparable injury where he has an adequate remedy in the state courts?

3. Does such court have jurisdiction where plaintiff makes only a colorable attack on the constitutionality of a statute and only attacks the constitutionality of an order which has effected no change in the situation created by the statute?

4. Should such court abstain from exercising jurisdiction where to exercise it will be to interfere with a local policy expressed in the order objected to and not yet ruled on by the courts of the state?

5. Should such court abstain from exercising its jurisdiction to await an authoritative interpretation of state statutes where an administrative order is alleged to be in violation of an entire title of the state code?

6. Should such court abstain from exercising its jurisdiction pending state action which may make unnecessary a decision on constitutional issues where an order is alleged to be in violation of the state constitution?

STATUTES INVOLVED.

The statutes involved are printed in Appendix A to the brief in No. 146 and for brevity are not repeated in this brief.

STATEMENT OF THE CASE.

This is a companion case to No. 146, involving the same parties and having facts in many respects similar, but also differing in certain important details. This case involves trains Nos. 7 and 8, operating between Sheffield, Alabama, and Chattanooga, Tennessee, as a part of Southern's Railway system. Insofar as the trains operate within the State of Alabama they are under the jurisdiction of the Alabama Public Service Commission.

In September, 1948, Southern petitioned the Commission to allow it to abandon the operation of trains 7 and 8 (R. pp. 8-13) pursuant to the requirements of Title 48, Secs. 35 and 106, Code of Alabama 1940, which require that no transportation company shall abandon any of its service to the public unless it first shall have filed an application for a permit to abandon service and shall have obtained from the Commission a permit allowing such abandonment. After two continuances a hearing was had on October 6, 1949, and on April 3, 1950, the Commission entered an order denying the application for authority to abandon, the order resting in large part on the failure of Southern to convince the Commission that it was sufficiently managed and practicing economies and failure to show that it was willing to take affirmative steps to try to put trains 7 and 8 on a paying basis (R. 27-39).

Southern did not ask for a rehearing under Title 48, Sec. 76, Code of Alabama 1940, nor did it take an appeal from the Commission's order, even though Title 48, Sec. 79,

allowed it. Instead Southern filed its complaint (R. pp. 1-17) in the United States District Court for the Middle District of Alabama, basing jurisdiction upon alleged federal questions involved and upon diversity of citizenship and asked for convocation of a District Court of three judges and a hearing under the provisions of 28 U. S. C. 2284. Southern alleged that the Commission's order deprived it of its property without due process, that it was being denied equal protection of the law, that interstate commerce was being burdened and that the order was unjust and confiscatory. It was also alleged that Southern had exhausted its administrative remedies.

Paragraph IV of the complaint (R. pp. 2-3) contained a colorable attack on the constitutionality of Title 48, Sections 35 and 106, Code of Alabama 1940, the railroad frankly stating that it was making such allegations for the purpose, and only for the purpose, of avoiding an admission of record that the statutes were unconstitutional, and also stating, "the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama." At the trial, as in the pleadings, Southern's only real attack on constitutional grounds was directed at the Commission's order of April 3, 1950.

Appellants first filed with Honorable Charles B. Kennamer, Judge of the United States District Court for the Middle District of Alabama, a motion directed to him individually asking that he stay the calling of a three-judge court (R. pp. 19-20). No formal order was issued by Judge Kennamer (this motion was ruled upon by the three-judge court after it convened, along with other motions). Appellants filed a motion to dismiss (R. p. 21), a motion to stay (R. pp. 39-41), and an answer (R. pp. 24-39). After oral argument before the three judges all of appellants' motions were overruled and denied and evi-

dence was then taken and the case submitted on the prayer for permanent injunction. Thereafter the Court issued its final judgment and decree (R. pp. 45-72), overruling all of appellants' motions, declaring the order of April 3, 1950, to be null and void, and enjoining the appellants, their successors in office and their agents, servants and attorneys, from taking any steps or proceedings of any nature whatsoever against Southern to enforce the order of April 3, 1950, or to enforce any fine, forfeiture or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against plaintiff, its officers, agents or employees on account of the failure to observe the provisions and requirements of the order by abandoning and discontinuing the operation of trains 7 and 8 so far as operated in the State of Alabama.

It is important to note that in case 146 the two trains involved were out of operation and the railroad refused to put them back in operation in the face of an order of the Commission to do so, while in this case the trains were in operation at the time the suit was filed and continued in operation until the temporary restraining order was issued. In case 146 there had been an actual violation of the criminal laws of Alabama and the Commission had called the attention of the railroad to one of the statutory penalties for such violation, while in case 395 there was no violation of the criminal law nor did the Commission even go so far as to call the railroad's attention to what the criminal provisions were. Also in case 146 the purported attack on the constitutionality of the Alabama statutes, while colorable, was not as openly so as in this case, where Southern acknowledged that such allegations were made only to avoid an admission of record.

SPECIFICATION OF ERRORS.

The District Court of the United States for the Middle District of Alabama, Northern Division (single judge), erred:

1. In failing and refusing to grant defendants' motion to stay the call of a three-judge federal court, which motion was filed on, to-wit, the 15th day of May, 1950, and overruled and denied by the three-judge court on July 20, 1950.

The three-judge District Court of the United States for the Middle District of Alabama, Northern Division, erred:

1. In overruling and denying the motion of the defendants to dismiss the action, which motion was overruled and denied on July 20, 1950.

2. In overruling and denying the motion of the defendants to stay the action pending determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the orders or decrees of the Alabama Public Service Commission complained of in the complaint, which motion was overruled and denied on July 20, 1950.

3. In rendering the final decree rendered on July 20, 1950.

4. In assuming jurisdiction of this cause.

5. In exercising jurisdiction of this cause.

6. In proceeding with the hearing of this cause prior to the determination in the courts of the State of Alabama of the appeals which might be taken by the plaintiff from the order or decree of the Alabama Public Service Commission complained of in the complaint.

7. In vacating and declaring null and void and of no effect the order of the defendant Alabama Public Service Commission dated April 3, 1950.

8. In assuming jurisdiction to enjoin enforcement of the criminal law of the State of Alabama.

9. In decreeing that a permanent injunction be issued enjoining the defendants and each of them, and their successors in office and their agents and attorneys, from taking any steps or proceedings of any nature whatsoever against the plaintiff, its officers, agents or employees, to enforce the provisions of the order of the Alabama Public Service Commission dated April 3, 1950, denying plaintiff authority to abandon certain train service, or to enforce any penalties, fines, forfeitures or other sanctions provided by Title 48, Code of Alabama 1940, or any remedies against the plaintiff, its officers, agents or employees, on account of the failure to observe the provisions and requirements of said order by abandoning and discontinuing operation of certain passenger trains between Tuscumbia, Alabama, and Chattanooga, Tennessee, insofar as they are operated within the State of Alabama.

ARGUMENT.

Since this case is in many respects similar to its companion, No. 146, argument will be set out only on points where it is necessary to supplement or distinguish what has been said in the brief on No. 146.

I.

A Federal Court Should Decline to Enjoin Enforcement of the Criminal Law of the State of Alabama.

Because of the difference in facts between this case and No. 146, i. e., that Southern kept its trains running in this case, there had been no violation of Alabama law at the time the suit was filed and the District Court itself acknowledged that the threat of multiplicity of prosecutions was not the ground on which it gave relief (R. p. 53). The Court found "tenuous" appellants' contention that the injunction would restrain enforcement of the criminal laws of Alabama in an unwarranted manner, on the theory that it could assume that if it declined to interfere with the enforcement of the criminal laws Southern would continue to operate its trains (R. p. 53). This is a surprising presumption in view of Southern's previous flagrant disregard of the law in No. 146.

II.

There Was No Jurisdiction in Any Federal Court of Equity, There Being No Irreparable Damage Because Southern Had an Adequate Remedy in State Courts.

The injunction was based on the theory of irreparable damage in the form of operational losses (R. p. 55). It is

basic law that equity should withhold relief where there is no irreparable damage, and it is submitted that no party can be irreparably damaged where he has a speedy and effective remedy in state courts. Southern could have requested a rehearing (Title 48, Section 76, Code of Alabama 1940) but did not, or could have appealed to the Circuit Court of Montgomery County (Title 48, Sec. 79). See **Natural Gas Pipe Line Co. v. Slattery**, 302 U. S. 300, 58 S. Ct. 199 (1937), where plaintiff company, which had been directed by the Illinois Commerce Commission to furnish certain statistical data, was held not to be entitled to equitable relief from a federal court because it could have applied for a hearing from the Commission to ascertain whether the order was "improper, unreasonable or contrary to law," under an Illinois statute authorizing the Commission to "rescind or amend any * * * order or decision made by it." After such petition and upon such hearing the Commission could have modified its order or postponed the effective date thereof. Since large statutory penalties were involved it was held that refusal of postponement of the effective date would have been the occasion for recourse to the courts, but that since plaintiff had not asked for such postponement he had stated no case for equitable relief. The provision of the Alabama Code relating to application for rehearing before the Commission is the substantial equivalent of the Illinois statute, for on such rehearing the Commission could alter, amend, rescind, revoke, postpone or take whatever action to which petitioner could show himself justly entitled. But Southern never asked for this.

In **Burford v. Sun Oil Company**, 319 U. S. 315, 63 S. Ct. 1098 (1943), Mr. Justice Black pointed out in Footnote 29, "Equity relief may be withheld where the state remedy is adequate. **Atlas Life Ins. Co. v. W. I. Southern, Inc.**, 306 U. S. 563, 59 S. Ct. 657." In the **Atlas** case the beneficiary on an insurance policy sued in state court on the policy;

the next day the insurance company sued in equity in federal district court seeking cancellation of the policy on the ground of fraud. The District Court sustained a motion to dismiss on the ground that the insurance company had an adequate remedy at law by setting up fraud as a defense to the action pending in state court (306 U. S. at 570, 59 S. Ct. at 661):

> "Ordinarily when the defense of fraud may be interposed to an action of law on the policy and such an action is imminent or pending, there is no occasion for equitable relief and the parties will be left to their rights as determined in the suit at law. In such a case the bill is dismissed without prejudice, **not because there is a want of jurisdiction in the federal court, but because the plaintiff has made no case for equitable relief.** Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 20 L. Ed. 501; Cable v. United States Life Insurance Co., 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188; Enelow v. New York Life Insurance Co., supra; Di Giovanni v. Camden Insurance Assn., supra. And since the issue is not one of jurisdiction but of the need and propriety of equitable relief, the mere fact that the suit at law which is imminent can be brought only in the state court, or that it is pending there, is immaterial. Cable v. United States Life Insurance Co., supra; Di Giovanni v. Camden Insurance Assn., supra; cf. Phoenix Mut. L. Insurance Co. v. Bailey, supra. It is no ground for equitable relief that the suit at law is brought in a state rather than a federal court, for the insurance company's defense may be protected there as well as in a federal court, and in that case there is no threat of irreparable injury." (Emphasis supplied.)

Southern had a remedy both speedy and adequate in the Alabama courts (see full discussion of method and scope

of appeal in No. 146 brief). And if any actions had been brought against the railroad for violating the statutes or orders, it could have set up as a defense all the matter brought out in this case.

III.

The Three-Judge Federal District Court Had No Jurisdiction of This Cause.

The failure to meet jurisdictional requirements of 28 U. S. C. 2281 is even clearer in this case than in No. 146. The injunction was not sought on the ground of the unconstitutionality of a **statute**. The attack on Title 48, Secs. 35 and 106, is wholly colorable, and Southern frankly stated that it did not ask for adjudication of constitutionality of the statutes (R. p. 2):

> "Plaintiff is advised and believes, and therefore alleges, for the purpose and only for the purpose of avoiding an admission of record that the statutes are unconstitutional and void as an unlawful delegation of legislative power, but the plaintiff does not ask in this suit for an adjudication of the constitutionality of said statutes as that is a matter primarily for the Supreme Court of Alabama."

The prayer for relief (R. pp. 7-8) includes statutes in the requested cloak of protection for it refers to "any penalties or other remedies provided under the laws of the State of Alabama," but the statutes included neither are identified nor is their constitutionality attacked.

As to any **order**, the prayer for relief and the relief granted went far beyond the outer limits of the language "such statute" (or "such order").

Also it is apparent that Southern objects not to the order but to the statutes, which admittedly are properly ruled on by the Supreme Court of Alabama. The order merely denied relief, changed nothing, for the trains were running in compliance with the statute before it was issued and were running in compliance with the statute after it was issued. The "negative order" doctrine of **Standard Oil Co. v. U. S.**, 283 U. S. 235, 51 S. Ct. 429 (1931), and **Piedmont & Northern Railway v. U. S.**, 280 U. S. 469, 50 S. Ct. 192 (1930), has been carved away somewhat, though to what extent is not clear.

See: **U. S. v. I. C. C.**, 337 U. S. 426, 69 S. Ct. 1410 (1949);
Cf: **Ashland Coal & Ice Co. v. U. S.**, 325 U. S. 840, 65 S. Ct. 1573 (1945).

But more than a negative order is involved here where the attack on the order is the nominal basis for three-judge jurisdiction on constitutional grounds with relief being sought from a statute whose constitutionality is admittedly a matter for state court decision. Southern seeks to create a new field for federal jurisdiction under Sec. 2281 by using allegations of unconstitutionality of an order as a springboard to get into court while seeking relief from a constitutional statute and from any and all forms of redress to which it might be subject whenever it wishes to violate the laws of the state.

IV.

The Federal Court Should Abstain From Exercising Jurisdiction of Matters Properly Decided by State Courts.

The District Court specifically found that the doctrine of discretionary abstention or comity did not apply, on the theory that there were no novel, ambiguous or undecided

questions of state law involved (R. p. 51). It is submitted that this is erroneous for several reasons. It overlooks the plain import of **Railroad Commission v. Pullman Co.**, 312 U. S. 496, 61 S. Ct. 643 (1941); **Burford v. Sun Oil Co.**, 319 U. S. 315, 63 S. Ct. 1098 (1943); **Railroad Commission v. Rowan & Nichols Oil Co.**, 311 U. S. 570, 61 S. Ct. 343 (1941); and **Stainback v. Mo Hok Ke Lok Po**, 336 U. S. 368, 69 S. Ct. 606 (1949); that irrespective of novel or undecided questions of law a federal court will decline to interfere in the field of shaping local administrative policy on matters requiring constant adjudgment in terms of local problems.

Further, there actually were undecided matters of local law of very real import and they were strenuously urged in oral argument and in briefs. As one of the strong criteria in deciding questions of public convenience and necessity the Alabama Commission has adopted the recommendation of the Interstate Commerce Commission in its annual report to Congress in 1948 (R. p. 36), calling on the railroads to seek new devices, new methods and improvements. On this question the Commission found as follows (R. p. 37):

> "In regard to economies, we firmly feel that in this case the petitioner has made no attempt to explore the possibilities of a more economic operation but has steadfastly maintained an expensive operating level. This is indicated by the fact that it discontinued the use of a light Diesel unit which unquestionably was rendering adequate and attractive service and substituted a much heavier and expensive steam operation and the fact that with the exception of the six light Diesel units previously mentioned and purchased in 1939, it has not made nor does it appear that it intends to make any experiments with low cost passenger train equipment."

And as follows (R. p. 35):

> "Regardless of frequent shopping we are convinced that had this light Diesel equipment been retained on this line, the operating expenses here shown for the type of equipment now used would be substantially less, not only in mechanical operating costs but also in wages, despite the fact that no costs are shown in the record during the time Diesel power was used. In fact we are inclined to the opinion that this change was a forethought toward ultimate discontinuance of trains 7 and 8."

And ruled as follows (R. p. 38):

> "In dealing with the matter of an economic operation it is not our purpose to attempt to dictate the managerial policy of the railroad but to point out that such matters could and should be thoroughly and carefully investigated before the public is deprived of a needed service and the 'bold experiments' if necessary should be invoked. In this case, as we have stated, no such attempt has apparently been made. Therefore, the public and the Commission is entitled to know whether or not a service can be made to bear its costs or to yield a profit before it should be summarily discontinued. Until such a showing is made by petitioner that it has found experimentation with other devices or other available avenues of economy are ineffectual, we will view with reluctance a request to abandon a service meeting a public need."

The Supreme Court of Alabama previously had given impetus to this line of thought by its decision in **Alabama Public Service Commission v. Atlantic Coast Line R. Co.**, 45 So. 2d 449 (1950), where it had been said (45 So. 2d, at 452-453):

> "But after making such allowance there would be a large increase of operating expense in 1947 over

1946 (approximately $17,000.00). This is said to be the result of post-war inflation. But it is hard to explain such a difference between 1946 and 1947 expense, since they were both probably subject to the same post-war inflation. **No effort is shown to reduce such expense by observing economies,** as in Mississippi Railroad Comm. v. Mobile & Ohio R. R. Co., 244 U. S. 388, 37 S. Ct. 602, 61 L. Ed. 1216." (Emphasis supplied.)

A hazy and shifting line exists between the function of management and of regulation—how far can the Commission go in requiring a carrier to come forward and show that a branch line not only is not but cannot produce its fair share of revenue, by requiring affirmative showing of efficiency of management, observation of economies, attempts to use available new equipment, and "bold experimentation with new devices and methods." It is significant that Southern did not put either before the Commission or the District Court the statistical data showing the result of several years of operation of lightweight modern Diesel equipment on the same Sheffield-Chattanooga run. The Commission in this case has struck out at the railroad's negative approach to branch line operation. Is this Commission policy lawful within the framework of public convenience and necessity as defined by Alabama courts? We do not know; no Alabama case has yet ruled on it. Can the Commission deny authority to discontinue solely on the basis of failure to meet its standards in this regard irrespective of the size of past losses? We do not know. If these criteria cannot be conclusive, to how much weight are they entitled, if any at all? We do not know. If the Supreme Court of Alabama subsequently should find them conclusive, will the federal determination of this case stand or must Southern put its trains back on? We do not know.

In addition, Southern itself squarely raised problems of interpretation of local law by its averment that the order is in the teeth of the policy requiring efficient and economical management by plaintiff and other railroad companies of their property as expressed in the Interstate Commerce Act and **Title 48 of the Alabama Code** and that the order is in "**violation of the Constitution of the State of Alabama**" (R. p. 7). Is it not the rule of this Court to allow the Alabama Supreme Court to rule first on the question of whether the order violates the "policy" of Title 48 of the Alabama Code embracing 475 sections and more than 200 pages?

Shipman v. Du Pre, 339 U. S. 321, 70 S. Ct. 640 (1950);
Watson v. Buck, 313 U. S. 387, 61 S. Ct. 962 (1941);
Railroad Commission v. Pullman Co., 312 U. S. 496, 61 S. Ct. 643 (1941);
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 62 S. Ct. 986 (1942);
A. F. L. v. Watson, 327 U. S. 582, 66 S. Ct. 761 (1946);

and whether the Constitution of Alabama has been violated. In either case a decision on federal constitutional grounds may be avoided.

A. F. L. v. Watson, supra;
Spector Motor Service v. McLaughlin, 323 U. S. 101, 65 S. Ct. 152 (1944);
Chicago v. Fieldcrest Dairies, supra;
Railroad Commission v. Pullman Co., supra.

CONCLUSION.

It is respectfully submitted that the decree of the District Court should be reversed and the cause ordered dismissed, or that the decree be reversed and the cause ordered stayed in the District Court pending adjudication

in state courts of the issues of constitutionality and statutory interpretation which are involved.

Respectfully submitted,

.....

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I certify that a copy of this brief has this day been served upon Marion Rushton, Esq., of Counsel for Appellee, this the ..... day of January, 1951.

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Of Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION et al.,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY,
Appellee.

Appeal from the United States District Court
for the Middle District of Alabama.

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Appeal from the United States District Court
for the Middle District of Alabama.

REPLY AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

Since the arguments contained in the reply and supplemental brief filed in Case No. 146 apply equally to Case No. 395, appellants, in the interest of brevity, hereby adopt

and incorporate those arguments and address them, in reply, to Case No. 395.

Respectfully submitted,

.....

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Of Counsel for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION, ET AL, *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

BRIEF FOR SOUTHERN RAILWAY COMPANY.

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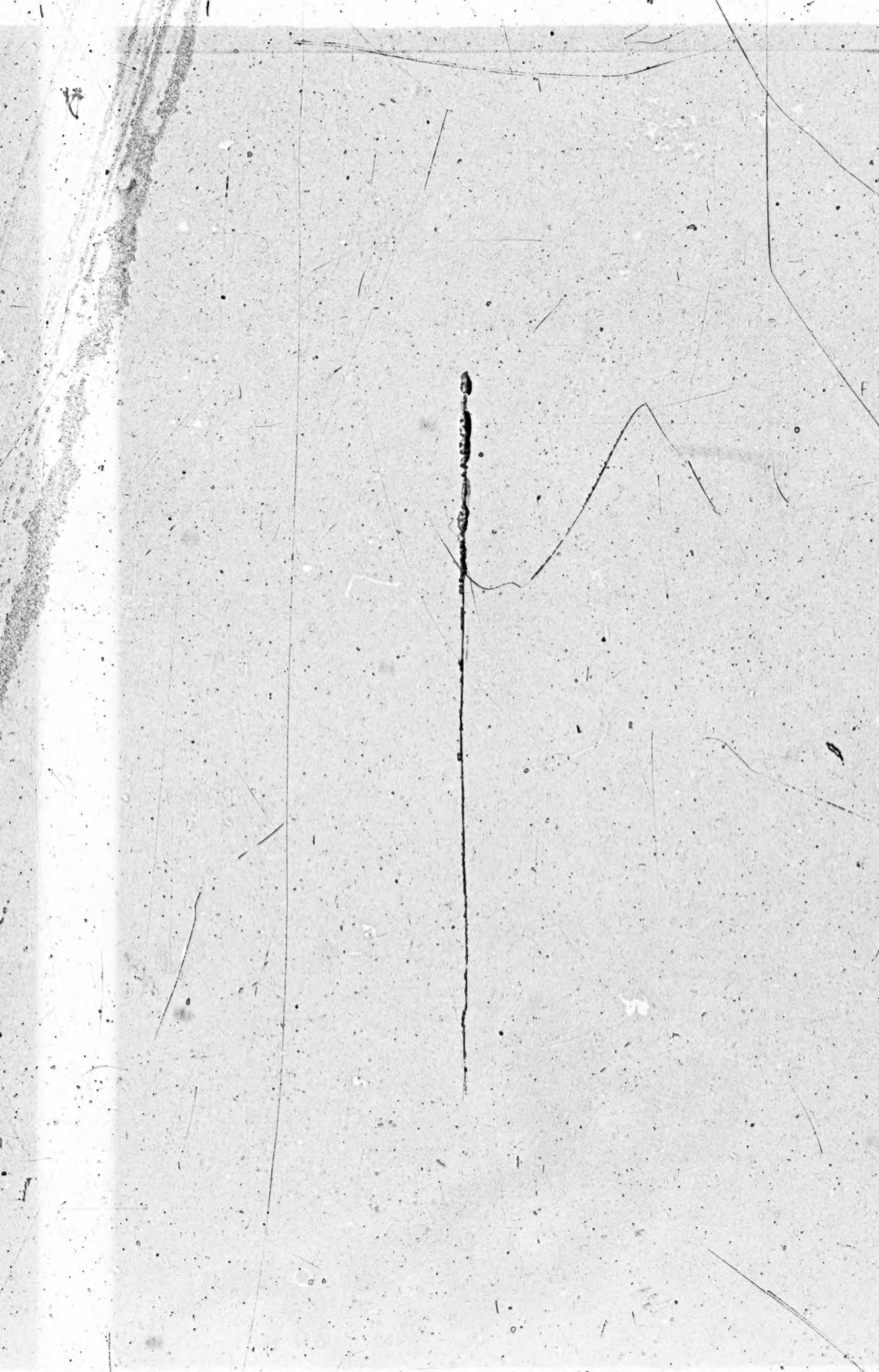

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TABLE OF CASES.

CONSTITUTION AND STATUTES.

IN THE

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OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION, ET AL, *Appellants*,

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BRIEF FOR SOUTHERN RAILWAY COMPANY.

OPINIONS BELOW.

The opinion of the specially constituted three-judge United States District Court, for the Middle District of Alabama, Northern Division thereof (No. 681-N), appears in the record at pages 45-71, and is reported 91 Fed. Supp. 980.

The report and order of the Alabama Public Service Commission which gave rise to the proceedings in the district court appear in the record at pages 27-39.

JURISDICTION.

This is a direct appeal authorized by Title 28 U. S. C., Section 1253.

Suit was brought in the district court under the provisions of the Act of June 25, 1948: 28 U. S. C., Sections 1331, 1332, 2281, and 2284.

STATUTES INVOLVED.

28 U. S. C., Sections 1253, 1331, 1332, 2281, 2283, and 2284. Alabama Code, 1940, Title 48, Sections 17, 79, 82, 84, 86, 87, 88, 89 and 106.[1] Constitution of the United States Amendment XIV, Section 1.

STATEMENT OF THE CASE.

September 13, 1948, Southern Railway Company, appellee, filed a petition (R. 8) with the Alabama Public Service Commission (Docket 11988) for authority to discontinue operation of its passenger trains Nos. 7 and 8 operated daily between Tuscumbia, Ala., and Chattanooga, Tenn., in so far as their operation took place within the State of Alabama, to-wit, 130 miles in each direction.[2]

The ground for this application was the disparity between the revenue and the cost of operation because of small public patronage due to motor car operation, public and private, over improved highways, showing the lack of public need for such rail service. The petition recited that for a twelve-month period the direct expenses of operating these trains exceeded the total revenues therefrom by $78,710.74 (R. 9).

The Alabama Commission did not set appellee's application for hearing until June 2, 1949; then of its own motion postponed the hearing date until August 4, 1949, and still later, until October 6, 1949, on which date the application was heard before three representatives of the Commission, none of the three commissioners sitting (R. 3).

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[1] Set out in full in Appendix A, pages 34-35, and Appendix B, pages 35-38. Appellee's brief in No. 146.

[2] The operation between the Alabama-Tennessee state line and Chattanooga, Tenn., a distance of about 15 miles, was authorized to be discontinued by the Tennessee Railroad and Utilities Commission, Docket No. R. 3085.

Under the state statute the Commission is required to render decision within ninety days after the completion of hearings, provided that it may issue an order stating its reason for inability to decide the case within ninety days, and thereupon extend the time for decision for another period not to exceed ninety days. Title 48, Alabama Code 1940, Section 77.

April 3, 1950, a year and nearly six months after the petition was filed, the Commission issued its report and entered its order thereon denying appellee's application to discontinue these trains (R. 27-39, Exhibit A to defendants' answer).

May 3, 1950, appellee, Southern Railway, filed its complaint (R. 1) in the United States district court pleading the application to discontinue, the denial thereof and charging thereby that the defendant Commission had denied appellee due process of law and confiscated and deprived it of its property for public use without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States (R. 7). Diverse citizenship and appropriate jurisdictional amount were alleged. The prayer was for a decree declaring the order of the Commission null and void, and for interlocutory and permanent injunctions against the Commission, its members, and the Attorney General, from proceeding against the railway, its officers, agents, or employees, to enforce any penalties or other remedies provided under the laws of the State of Alabama on account of failure to continue operation of passenger trains Nos. 7 and 8, required by the order of defendant Commission of April 3, 1950. (R. 7, 8.)

Defendants filed their motions to stay (R. 21 and R. 39) and their answer (R. 24).

Designation of the three-judge court was filed on May 8, (R. 17) and on that date the court set the cause for trial May 22, 1950 (R. 18) on which date it was heard (R. 46).

July 20, 1950, the three-judge district court filed its opinion, findings of fact, and conclusions of law (R. 45-71), and on that date entered its final decree (R. 71-72).

September 18, 1950, the district court entered an order allowing appeal (R. 42).

November 27, 1950, this Court noted probable jurisdiction and transferred this case, No. 395, to the summary docket and assigned it for argument immediately following the argument in No. 146, which case it also transferred to the summary docket (R. 75).

ARGUMENT.

In their brief appellants argue four points: I. A federal court should decline to enjoin enforcement of the criminal laws of the State of Alabama. II. There was no jurisdiction in any federal court of equity, there being no irreparable damage because Southern Railway had an adequate remedy in the state courts. III. The three-judge federal district court had no jurisdiction of this cause. IV. The federal courts should abstain from exercising jurisdiction of matters properly decided by state courts. While stated as four points in the brief in this case, No. 395, the points are embraced within three points argued in No. 146, October Term, 1950, a companion case.

Having discussed the points argued in No. 146 in our brief in that case and, we submit, having shown them to be without merit and the supporting arguments to be unsound, we do not burden the Court with a repetition of our arguments in this brief. We therefore take the liberty of referring to our brief in No. 146, believing ourselves justified in doing that because No. 395 has been assigned for argument immediately following the argument in No. 146. Likewise we refer to the statutes, federal and state, set out in appendices to our brief in No. 146, rather than duplicate them in appendices to this brief.

We take the further liberty of saying that here we also rely on the strong opinion, findings of fact and conclusions of law filed by the three-judge district court in this cause, and conveniently appearing in the record at pages 45-71. Therein, Judge Lynne, speaking for the unanimous court,

overruled appellants' motions in clear and precise language, amply supported by authorities cited, and then in the findings dealt with the evidence in much detail. The conclusions of law found specifically: That should the railway continue to operate these trains it would suffer irreparable damage by spending sums grossly disproportionate to revenue in a situation where there is no public necessity or demand for such service; that if the railway fails to operate said trains it must be subjected to irreparable loss by incurring liability under sanctions imposed by Title 48, Code of Alabama, 1940, including Sections 110, 399, 400, and 405; that plaintiff will suffer such irreparable damage unless injunctive relief is granted against defendants and their successors in office from seeking to impose the sanctions provided by the Alabama statute, upon discontinuance of operation of these trains; and that the Commission's denial of permission to discontinue operation is unjust, unreasonable, and confiscatory, and deprives the railway of its property without just compensation in violation of the Fourteenth Amendment to the Constitution of the United States.

As we have said, Nos. 146 and 395 are companion cases. There are a few points of difference.

In both cases the same railway filed applications with the same state commission as required by the same state statute to discontinue operation of unprofitable passenger trains for which there was no public need. Both applications were denied, after long delay.

All four trains were discontinued on October 26, 1949, in compliance with an Interstate Commerce Commission order. Trains 7 and 8 (Case 395) were restored when the Interstate Commerce Commission's order was lifted effective November 21, 1949. Trains 11 and 16 (Case 146) were not restored, for while they were out of operation the railway filed a supplemental petition with the Commission for authority to not restore them.

This difference arose because the hearing had been held on Trains 7 and 8 on October 6, 1949. As the Commission

had waited thirteen months to hear the case, the railway expected a prompt decision. On the record made the railway anticipated an order authorizing discontinuance. In the case of Trains 11 and 16, fourteen months had elapsed, but no hearing date had even been announced. The losses on 11 and 16 were large and steadily increasing. This prompted the railway to file the supplemental petition on trains 11 and 16 and to advise the Commission that it was unwilling to restore the trains until it had been heard on its supplemental petition to not restore them. This course brought a hearing date in less than thirty days, and, after hearing, an order, even though a denial, was rendered in thirty days.

The entry of the final decree on February 13, 1950, by the three-judge court in No. 146 merged the temporary restraining order of December 6, 1949, against the Commission's order of December 5, entered on the citation it had served on the railway. Viewed as of the final decrees, the two cases are in substantially the same position.

The other point of difference between these cases is in the complaints.

In No. 146 the railway, while not challenging the constitutionality of the requirement of the Alabama statute (Section 106, Title 48 of the Code) that an application be made and authority received from the Commission before discontinuing passenger train operation, did allege[3] that no standards for the guidance of the Commission were prescribed, and the statute was therefore unconstitutional as an unlawful delegation of legislative power. This allegation was not pursued on argument nor passed on by the court below. It was not a factor in the case, and can be treated only as surplusage.

In the complaint in No. 395 we specifically disclaimed any purpose to have that point adjudicated (Paragraph IV of the complaint, R. 2) and it was not a factor therein.

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[3] Paragraph 4; R. 2, Case No. 146.

In both cases we stand squarely on the doctrine of *Oklahoma Natural Gas. Co.* v. *Russell*, 261 U. S. 290 (1923) that Section 2281 of Title 28 U. S. C. (then Section 266) encompasses orders of state commissions of the type involved in both these cases.

Appellants have attempted to make a distinction of those differences in the complaints and have asserted that we were in error in either instance. However, there is no such distinction in the cases and there is no distinction in Section 2281 between cases where a state statute is attacked as unconstitutional and those in which an administrative order enacted under a state statute is so attacked.

We submit in the case at bar (No. 395) that appellee was denied due process of law first by the Commission's dilatory tactics in setting the case and twice postponing it so that a period of thirteen months elapsed between the filing of the petition and the hearing date, and then to compound such dilatory action the Commission delayed until the very last day allowed by state law before rendering a decision—a lapse of a year and a half from the filing of petition to date of order denying petition. The railway might have filed its complaint treating nonaction as substantially a denial of its application. This Court has held that a party so situated is not required indefinitely to await a decision. We refer to *Smith* v. *Illinois Bell Tel. Co.*, 270 U. S. 587 (1926), where, at pages 591-592, it was said:

> "* * * Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a federal court for equitable relief. The facts, which the motion to dismiss conceded, present a far stronger

case for such relief than any of the cases with which this court dealt in."[4]

The unseemly delays in setting a hearing and then deciding this case become all the stronger as a denial of due process when it is recalled that in the application filed with the state commission the applicant railway's loss was shown as $78,710.74 for a twelve-month period, that is to say, the direct expenses exceeded the total gross revenues from operation by that amount. Numerous other items of cost could have been included in this computation but were omitted. Upon the hearing the loss from operation over the next twelve-month period was shown to the Commission to amount to $102,326.93. Finally the loss for the next five months was shown to be $53,692.56. The total for the three periods amounted to $234,730.23. Despite that heavy loss, continuing from day to day, and at an ever increasing ratio, the Commission unduly delayed setting the case, and then further delayed in deciding it.

In the district court the railway showed the daily average revenue from passengers in comparison with the daily cost for wages and fuel in the operation of these trains for the three periods just referred to. The computation was made on a per day basis to be fairly comparable in view of the fact that the trains had been out of operation a different number of days in the three periods. Likewise, in the district court the railway made this computation for the succeeding eight-month period. These comparisons show that the revenue from passengers fell short of the amount necessary to pay the wages, payroll taxes thereon, and fuel consumed by $57.10 per day during the first twelve-month period, $151.45 during the second twelve-month period, $168.24 during the third five-month period,

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[4] Omitted authorities

Okla. Gas Co. v. Russell, 261 U. S. 290, 293; *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49; *Pacific Tel. Co.* v. *Kuykendall*, 265 U. S. 196, 204; and *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 415.

and $195.43 per day during the fourth period of eight months.[5] Such delay in the face of such losses was a denial of due process, and such losses clearly show confiscation of the railway's property.

Upon compliance with the Commission's order of April 3, 1950, denying application to discontinue operation, appellee would necessarily incur, and continue to incur, tremendous losses from such operation. On the other hand, refusal to comply with said order would inevitably subject appellee to the statutory sanctions provided in the Alabama statutes for violation of the Public Service Commission's orders. There are several such penalty statutes and each day would constitute a violation, hence the amounts multiply rapidly with each passing day. No matter which horn of dilemma appellee should select, it would suffer irreparable damage.

That appellee was immediately confronted with irreparable damage was clear. Appellee had just had a painful experience with the Alabama Public Service Commission in connection with Trains 11 and 16 involved in Case No. 146 before this Court. There the Commission had needlessly delayed hearing the original and supplemental applications. It issued a pre-emptory order on a citation against the railway. It issued this order following the pretense of a hearing at which the railway appeared and offered its showing in the premises by witnesses then present, which evidence the Commission would not receive. In the pre-

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[5]

Operation of Trains 7 and 8	Average Daily Revenue From Passengers	Average Daily Wage and Fuel	Daily Excess Wages & Fuel Over Revenue
12 mos. ending 2/29/48	$180.94	$238.04	$ 57.10
12 mos. ending 2/28/49	124.74	276.19	151.45
5 mos. 3/1 to 7/31/49	97.02	265.26	168.24
8 mos. 8/1/49 to 3/31/50	83.11	278.57	195.46

Trains Discontinued Under I.C.C. Orders
Mar. 21, 1948 through May 2, 1948.....43 days
Oct. 26, 1949 through Nov. 20, 1949.....26 days
Jan. 9, 1950 through Mar. 11, 1950.....62 days
(Exhibits 4 and 5 to Complaint, R. 15, 16)

emptory order issued on the citation specific attention was therein called to the penalty statutes of the state. The railway was informed that it would not be heard on its original application until operation of the trains had been restored.

Even after a hearing date was set the Commission advised the railway that unless the trains were restored, it would be optional with the Commission whether the hearing would be held, or, as the Commission put it, until the railway had by restoring the trains purged itself of contempt. That the Commission was in a fighting mood clearly appeared from the foregoing facts and the further fact that the very day these trains were discontinued, in compliance with an order of the Interstate Commerce Commission, the Alabama Commission notified appellee that it expected such trains to be restored within twenty-four hours after the order of the Interstate Commerce Commission might be lifted. That all transpired immediately before the entry of the order of April 3, 1950, denying application to discontinue Trains 7 and 8 involved in Case No. 395. Experience is the best teacher. Appellee knew what to expect. Therefore, faced with immediate irreparable injury, appellee filed its complaint seeking injunctive relief.

In the case at bar, as in No. 146, there was no case pending in the state courts. The complaint was filed in the district court on May 5. On May 8, the three-judge court was designated and notice given the case would be tried on May 22. Following the trial on that date briefs were filed and the final decree was rendered on July 20. Appellants failed to institute proceedings for adjudication of the issues in the state courts, which they might have done, as contemplated by the last paragraph of Section 2284, Title 28 U. S. C. Here, as in Case No. 146, they waited until on appeal to this Court to raise purely procedural points, and in this case, as in No. 146, thereby in effect confessed the error the Alabama Commission made in denying application to discontinue these trains.

Appellants cite *Shipman* v. *Du Pre*, 339 U. S. 321 (1950) in support of their argument that federal courts should

abstain from exercising jurisdiction of matters properly decided by state courts. In the per curiam opinion in that case we find appellants' application for a declaratory judgment and injunction restraining the enforcement of certain sections of a South Carolina statute regulating fisheries and shrimping, on the ground that they violated the Constitution of the United States, was erroneously dismissed on the merits by a three-judge federal court, it not appearing that the statutory sections had been construed by the state courts. Citing *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-599, this Court vacated the judgment of the district court and remanded the cause with directions to retain jurisdiction to afford appellant opportunity to obtain by appropriate proceedings the construction by the state court.

In the case at bar there is no statute of the State of Alabama which it is necessary for the state courts to construe. Title 48, Section 106, simply requires that railways apply to the Alabama Public Service Commission and receive its authority for discontinuing train operation. Appellee railway has not challenged the constitutionality of that requirement. It filed application and, after long delay, the state commission denied the application. The state commission thereby applied the statute to appellee and under such application required appellee to run the trains in question. Appellee could comply and suffer the losses from such operation, or refuse to comply and suffer the penalties.

We submit *Shipman* v. *Du Pre* is of no avail to appellants here. Fruthermore, in that case this Court referred to its decision in *American Federation of Labor* v. *Watson*, 327 U. S. 582, 595-599. We refer to that case in order to better understand the decision in *Shipman* v. *Du Pre*. In *American Federation of Labor* v. *Watson* many sections of an elaborate state statute couched in the broadest terms were involved and there was much doubt over how the statute would be interpreted by the state authorities. Certainly there is no such complicated statutory scheme involved in

the Alabama statute with which we are here concerned. Also in *American Federation of Labor* v. *Watson* it appeared there was a state court proceeding in which the uncertainties in interpretation of the state law could be determined. There is no pending state action in Alabama in which the questions involved in the case at bar could be determined.

Having paused to comment on *Shipman* v. *Du Pre* because so recently decided by this Court, we think it all-important to call attention to *Toomer* v. *Witsell*, 334 U. S. 385 (1948). This case also involved the South Carolina statutes regulating shrimp fishing in the coastal waters. Toomer, et al., fishermen, citizens of Georgia, and a fish dealers' association, sued in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of the South Carolina statutes regulating shrimp fishing on the ground that they violated the Constitution of the United States.

The dealers' association was thrown out on the ground that it could show no irreparable injury from the enforcement of the statute. The individual fishermen failed to show that they had no adequate remedy at law in so far as their contentions with respect to the income tax statute was concerned since there was provision for payment of tax under protest and suit for recovery.

As to the fishermen's contention with respect to the regulatory statutes, however, it was held that they showed the imminence of irreparable injury for which there was no plain, adequate, and complete remedy at law, inasmuch as to remain at their occupation they were either required to pay out large sums of money for which no means of recovery were provided by South Carolina law or to assume the risk of heavy fines and long imprisonment for violation of the law.[6] If they withdrew from fishing until a test case

[6] Violation of the South Carolina statute brings suspension of the violator's license, as well as a maximum of $1,000 fine, or imprisonment for a year, or a combination of a $500 fine and a year's imprisonment. Page 391.

could be prosecuted they would have suffered a loss for which no compensation could be had (391-392). The court found that the doctrine of *American Federation of Labor* v. *Watson* did not apply (except as to a tax statute involved) since there was no need for interpretation of the statutes nor any other special circumstances requiring the federal court to stay action pending proceedings in the state court (392 footnote 15).

The decision of this Court in *Toomer* v. *Witsell* squarely supports appellee in the case at bar, No. 395, and in the companion case No. 146. We say that with the utmost confidence because should appellee railway comply with the state order and run the trains it immediately suffers a tremendous loss, and if it fails to run them it is immediately confronted with heavy penalties.

CONCLUSION.

The three-judge district court properly took jurisdiction, heard this cause, and entered its final decree therein. Appropriate averments were contained in the complaint, and are supported by the findings and conclusions of the district court. Upon the entry of the order of April 3, 1950, by the Alabama Commission denying appellee's application to discontinue the trains in question, the proceeding passed from the administrative to the judicial stage at which the railway had an election to sue in the federal or state court. Believing its remedy in the state court to be inadequate, decision was properly made to sue in the federal court; and upon invoking the jurisdiction of the federal court, quite properly, we submit, the cause necessarily came before a three-judge court. Appellants, having failed to avail of their opportunity afforded for adjudication of the issues in the state courts, as contemplated in the federal statutes, are now too late to be heard to complain that appellee sought federal jurisdiction rather than that of the state

courts. Their appeal here is without merit; their argument in support of it is unsound.

The decree of the district court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 395.

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

APPELLEE'S REPLY TO APPELLANTS' REPLY AND SUPPLEMENTAL BRIEF.

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v.

SOUTHERN RAILWAY COMPANY, *Appellee*.

APPELLEE'S REPLY TO APPELLANTS' REPLY AND SUPPLEMENTAL BRIEF.

This is a companion case to No. 146, October Term, 1950, of the same title. Having filed a reply brief in No. 146 to appellants' reply and supplemental brief therein, we ask the indulgence of the Court to refer thereto as equally applicable to this case, No. 395.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS,

v.

SOUTHERN RAILWAY COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION BY SOUTHERN RAILWAY COMPANY, APPELLEE, FOR AN ORDER THAT THE MANDATE OF THIS COURT REQUIRE THE DISTRICT COURT TO RETAIN JURISDICTION PENDING APPELLEE'S RESORT TO THE STATE COURTS OF ALABAMA.

SIDNEY S. ALDERMAN,
CHARLES CLARK,
Attorneys for Appellee,
Southern Railway Company.

IN THE

Supreme Court of the United States

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No. 395

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Comes now, in due season, Southern Railway Company, appellee in the above-entitled cause, and moves this Honorable Court to include in its mandate which it will issue in the above-entitled cause a provision in terms directing the United States District Court for the Middle District of Alabama to retain jurisdiction of the cause and continue in effect the injunction it issued therein on the twentieth day of July, 1950 (R. 71) * for a reasonable time within which to permit appellee promptly to resort to the state

courts of Alabama for determination and adjudication of its rights in the subject matter of this cause. In support of this motion appellee respectfully shows:

Mr. Chief Justice Vinson, in delivering the opinion of the Court in this cause, on May 21, 1951, said:

> "Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. Ala. Code, 1940, § 79. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law, id. § 82, and its decision may be appealed to the Alabama Supreme Court. Id. § 90. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.' *Avery Freight Lines, Inc.* v. *White*, 245 Ala. 618, 622-623, 18 So. 2d 394, 398 (1944)."

And:

> "* * * Appellee complains of irreparable injury resulting from the Commission order pending judicial review, but has not invoked the protective powers of the Alabama courts to direct the stay or supersedeas of a Commission order pending appeal. Ala. Code, 1940, §§ 81, 84."

And:

> "As adequate state court review of an administrative order based upon predominantly local factors is available to appellee, intervention of a federal court is not necessary for the protection of federal rights."

The order of the Alabama Public Service Commission in its Docket 11988 denying appellee's application to discontinue operation of Trains 7 and 8 involved in this cause was issued April 3, 1950 (R. 27).

The thirty-day period provided under Alabama Code 1940, § 79, within which appellee, applicant before the state commission, might have entered its appeal from said order to the Circuit Court of Montgomery County, Alabama, has expired.

The two trains, Nos. 7 and 8, were discontinued following the entry of the decree in the United States District Court on July 20, 1950, in Civil Action No. 681.

In *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), provision was made by this Court in keeping with appellee's motion here, for at page 501 of that opinion this Court said:

> "We therefore remand the cause to the district court, with directions to retain the bill pending a determination of proceedings, to be brought with reasonable promptness, in the state court in conformity with this opinion."

In *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 (1944), this Court again gave direction in keeping with the motion of appellee here, for, at page 106, it was said:

> "We therefore vacate the judgment of the Circuit Court of Appeals and remand the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought with reasonable promptitude in the State court in conformity with this opinion."

In the earlier case of *St. Louis &c. R. Co.* v. *Public Comm'n.*, 279 U. S. 560 (1929), the Railway had discontinued the operation of two passenger trains without preliminary application to the Alabama Commission for authority to discontinue them. The Railway on its bill filed in the United States District Court for the Middle District of Alabama obtained a restraining order to protect it incident to such discontinuance. This Court, holding that the Railway should have first made its application to the State Commission, vacated the decree of the District Court, but in that connection, at page 563, said:

> "* * * The Commission should give to the Railway the opportunity of presenting the facts; and if an application is made promptly, the matter should be determined by the Commission without subjecting the Railway to any prejudice because of its failure to ask leave before discontinuing the service. Compare *Lawrence* v. *St. Louis-San Francisco Ry. Co.*, 278 U. S. 228. To this end the decree will be vacated; and the restraining order will be continued."

Should this motion be denied, when Southern Railway Company, appellee here, resorts to the state courts of Alabama, it might be urged, and perhaps with success, by those in opposition, that Southern Railway Company by resorting to the United States District Court instead of taking its appeal under the state statute to the Circuit Court of Montgomery County within the thirty-day period provided in the state statute, has thereby lost its right to such appeal and now comes too late for consideration to be given its case in the state courts.

Appellee ought not to be prejudiced by reason of the fact that it elected to resort to the federal district court below, which this Court unanimously holds had jurisdiction of its cause.

WHEREFORE, Southern Railway Company, appellee in this cause, moves the Court to provide in its mandate that the District Court retain jurisdiction and continue the injunction granted by it in order to permit appellee promptly to go to the Circuit Court of Montgomery County, Alabama, and there assert its rights in keeping with the pronouncement of this Court in its opinion rendered herein on May 21, 1951.

Respectfully submitted,

SIDNEY S. ALDERMAN,
CHARLES CLARK,
Attorneys for Appellee,
Southern Railway Company.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

SOUTHERN RAILWAY COMPANY

Appeal from the United States District Court for the Middle District of Alabama.

SIDNEY S. ALDERMAN,
CHARLES CLARK,
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Southern Railway Company.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 395

ALABAMA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

SOUTHERN RAILWAY COMPANY

Appeal from the United States District Court for the Middle District of Alabama.

Comes now, in due season, Southern Railway Company, appellee in the above-entitled cause, and moves this Honorable Court to stay the issuance of the mandate from this Court to the United States District Court for the Middle District of Alabama by enlarging the time over and above the period of twenty-five days from the date the judgment was entered, to-wit, on May 21, 1951, sufficiently to permit appellee to take appropriate steps in the state courts of Alabama for determination and adjudication of its rights in the subject matter of this cause. In support of this motion, appellee respectfully shows:

The judgment of this Court was entered in this cause on May 21, 1951, reversing the judgment of the District Court.

On May 25, 1951, appellee filed with this Court its motion for an order providing that the mandate of this Court require the District Court to retain jurisdiction and continue in effect its injunctive decree (R. 71) pending appellee's resort to the state courts of Alabama.

On May 25, 1951, appellee's counsel forwarded a copy of said motion by United States mail to attorneys of record for appellants at Montgomery, Ala. This Court has not acted on appellee's motion. The date for adjournment of the present term of this Court is near at hand.

Since the judgment of this Court was rendered, appellee has filed with appellant, Alabama Commission, its further petition, supplementing and amending its original petition in said Commission's Docket No. 11988. In such petition appellee seeks an order from said Commission authorizing appellee to withhold reestablishing operations of Trains No. 7 and No. 8 pending consideration and disposition of the appeal and proceedings thereon which appellee is now initiating in the Circuit Court of Montgomery County, Alabama. Defendant Commission has not yet acted on appellee's said petition, so far as appellee is advised at this time.

Necessarily defendant Commission must have sufficient time (over which appellee has no control) to prepare the record, being the testimony and documentary evidence heretofore introduced before it upon the hearings in Docket No. 11988, certify to the same and transmit it to the Circuit Court of Montgomery County, Alabama, as provided in the statutes of Alabama, for consideration and determination of appellee's appeal from and its motion for supersedeas or stay of defendant Commission's order of April 3, 1950 (R. 27) denying application to discontinue operation of Trains No. 7 and No. 8. The state statute provides that the record is to be transmitted to the Circuit Court "within thirty days after the perfecting of the appeal as aforesaid, and sooner if practicable, . . ."

Unless appellee's motion is granted it will necessarily be prejudiced immediately upon the receipt of the mandate of this Court in the District Court whereupon the District Court will vacate its injunctive decree (R. 71) heretofore issued in this cause and thereby leave appellee without protection pending action by the state court upon appellee's appeal to the Circuit Court of Montgomery County, Alabama, and its prayer therein for a supersedeas or stay of the defendant commission's order involved in this cause.

WHEREFORE, Southern Railway Company, appellee in this cause, moves the Court to stay the issuance of its mandate for such reasonable time as will permit appellee to perfect its appeal to the Circuit Court of Montgomery County and there assert its rights in keeping with the decision of this Court in its opinion rendered on May 21, 1951.

Respectfully submitted,

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Attorneys for Appellee,
Southern Railway Company.